Supreme Court of the United States,

ON APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

THE UNITED STATES

vs.

THE JOINT TRAFFIC ASSOCIATION *et al.*

Brief for the Joint Traffic Association.

This is an appeal from the decree of the Circuit Court of Appeal for the Second Circuit affirming a decree of the Circuit Court of that Circuit dismissing the bill.

The object of the bill was to procure an adjudication that a certain agreement entered into between a large number of railroad companies forming most, but not all, of the lines or systems engaged in the business of railroad transportation between Chicago and the Atlantic coast for the purpose of forming an Association for the better regulation of a certain part of the traffic of those lines and systems, was illegal and void, and enjoining its execution.

For many years the business of these lines, like railroad business elsewhere, had been regulated to a greater or less degree by the voluntary co-operation

of the companies engaged in it; but such co-operation had been greatly hindered and rendered ineffective by reason of the tendency of the competition between them to run into those forms of deadly strife, commonly known as *rate wars*. These struggles made any such thing as uniformity and equality in rates wholly impossible, and resulted in other mischiefs alike detrimental to the railroads and to the public.

Moved by these considerations, Congress in 1887, enacted the Inter-state Commerce law, the main design of which was to abolish discrimination in rates and secure a greater decree of uniformity, and to that end it required all railroads engaged in inter-state transportation *to file with the Commission and publish* schedules of their respective rates, and forbade the carriage of goods for any greater or less compensation than that specified in the published rates.

It could not have been expected that this requirement to file and publish rates, which could not be departed from except by publishing new rates in the manner provided in the act, would be complied with without an attempt, at least, at concert of action in framing the schedules. Without this, every variety of charge for similar services would have been exhibited, and any road which found itself outbidden by another would be obliged, in order to retain its business, to frame new schedules, giving as low rates as any of its competitors, and perhaps lower ones; and thus a rapid and ceaseless changing of schedules would follow.

Accordingly, even before the passage of the law, the rival lines engaged in an effort to agree upon the schedules which each should file and had reached such agreement in time to file and publish them in compliance with the provisions of the law.

A difficulty, however, soon arose in consequence of the fact that the lines would not adhere to the rates fixed upon. The agreement, not being formal and solemn, could not be enforced; and

as soon as any line found it was losing business, it felt obliged to endeavor to recover it by decreasing its rates; but, as the law required the proposed change to be published beforehand, little would be effected by the change, inasmuch as the publication would at once notify rivals of the contemplated step and lead to a corresponding decrease by them.

The temptation was irresistible to get new business by lower rates without publishing them, and as soon as such a course was pursued by one party, its rivals would necessarily be driven to follow it. The risk of detection and punishment was insufficent to prevent these practices, but quite sufficient to induce all forms of concealment and dishonest artifices.

The mischiefs thus arising were intolerable, and compelled from time to time various efforts for relief. The agreement in question was the last result of these efforts, and was believed to promise great benefits, and to make it in the interest of all to comply with the Inter-state Commerce Act, and to detect, expose and punish any who, from a mistaken view of interest, should violate it. It made no effort to prevent competition; but sought to devise a scheme which would compel any competition to be fair, lawful and open, and enable any rival to meet it without violating any law.

Unfortunately, large corporations are viewed with a jealousy which does not confine itself at all times within the bounds of reason, and this sentiment creates hostilities to which it is but natural, at least, that public officials should yield. Transactions which in the absence of political prejudice and passion would pass unnoticed by those not immediately affected by them, are subjected to hostile scrutiny, and it was not unnatural that such an agreement would raise a clamor that it was designed to raise rates. There never was a pretence, however, that under the agreement there was the slightest exaction of unreasonable charges.

On the contrary, the schedules of rates agreed upon and filed with the Inter-state Commerce Commission had never been objected to by that body and were notoriously lower than those imposed for similar services in any other part of the world. But the assertion was that excessive rates *might*, at some time, be exacted and maintained under such agreements, and this was deemed a sufficient justification for attacking this one. At all events, it seems to have been thought that such agreements should not be allowed until the legality of them had been authoritatively sanctioned by the judicial tribunals.

While, upon the general principles of equity jurisdiction, no one would claim that a bill filed by the United States to declare an agreement void merely on the ground that it was illegal could be maintained, it seems to have been supposed that the provisions of the Inter-state Commerce Act, and of the act commonly called the Anti-Trust Act authorizing an appeal to this jurisdiction afforded grounds upon which this agreement could be directly attacked in a court of equity in the name of the United States on the mere allegation of *illegality*.

Accordingly the District Attorney for the United States, for the Southern District of New York, filed this bill in the Circuit Court for the Second Circuit against the Association and the several companies which had united in the agreement, praying for a judgment that the agreement was "unlawful, null and void," and that the defendants be enjoined from continuing in the combination or association established by the said agreement and from acting, or in any way operating their roads, thereunder.

The allegations upon which this relief was sought were that the agreement was entered into by the defendants "intending to restrain trade and commerce "among the several States and attempting to monopo-"lize such trade and commerce, and intending to re-"strain and prevent competition among the said rail-

"roads in respect to all the inter-state trade and "commerce hereinafter more particularly described." (Record, fol. 17). The subordinate allegations supposed to justify the one above alluded to respecting intent, were "that by the said agreement the said "companies surrendered to the said Association, subject "to certain exceptions hereinafter stated, all the com- "petitive traffic passing from, to, or through the western "termini" of certain trunk lines, which were described, "and such other points as might thereafter be desig- "nated as such termini by the Board of Managers con- "stituted by said agreement" (Record, fol. 20); also, that by the said agreement "the said railroad "companies, parties thereto, in order to terminate all "competition among themselves for the freight and "passenger traffic aforesaid, unlawfully agreed to sur- "render the control of such traffic to the Board of "Managers created by the terms of the said agreement "or articles of organization as aforesaid" (Record, fol. 23); also that "in and by the said agreement the "said companies, unlawfully and in restraint of trade "and commerce among the several States, agreed that "the said Board of Managers, to whom full control over "the aforesaid competitive traffic was surrendered and "entrusted by the terms of said agreement, should "divide the said competitive traffic among the railroad "companies, parties to said agreement, in such propor- "tions as they, the said Board of Managers, should de- "termine, thereby unlawfully combining a large part of "the freight business of the aforesaid several competing "railroads and railroad systems, restraining and pre- "venting competition among the said railroads in re- "spect to all such competitive traffic, and thereby un- "lawfully restraining trade and commerce among the "several States and territories of the United States, "and unlawfully attempting to monopolize a part of "such inter-state trade and commerce" (Record, fols. 26–27); also, "that the said several railroads and "systems, parties to said contract, agreement or articles

"of organization, in and by the said agreement or "articles of organization, and in furtherance of their "aforesaid unlawful purpose to restrain interstate trade "and commerce by unlawfully pooling or combining "the large and important part thereof hereinbefore "described, and for which, prior to the date of said "agreement, the said railroads, or many of them, were "actively and independently competing, to the great "advantage of the public, and of the United States, "both in facilities and in rates, fares and charges, un-"lawfully agreed that the Board of Managers created "by said agreement and thereby charged with the exe-"cution thereof, should have power to establish the "rates, fares and charges for carrying such traffic, both "freight and passenger; * * * * thereby unlawfully, "and in restraint of inter-state trade and commerce "contracting, agreeing and combining among them-"selves for the division between them of a portion of "the earnings of the said several railroad companies, "parties to the said agreement or articles of organi-"zation" (Record, fols. 27–29).

Most of the defendants adopted the answer of the Joint Traffic Association, which appears at page 62 of the Record. This answer admitted the making of the contract, but denied that it was "an unlawful "contract in any of its provisions, or that it is or was "intended to be a contract, agreement, combination or "conspiracy to restrain trade or commerce among the "several States, or was or is an attempt to monopolize, "or does or will operate to monopolize, such trade or "commerce, or is or was intended to restrain or prevent "legitimate competition among such railroads in re-"spect to any inter-state trade or commerce" (Record, fol. 194). It further denied "each and every allega-"tion of the bill of complaint imputing to the said "agreement or to the parties thereto any other agree-"ment or intent than such as appears on the face there-"of." The answer further denied that by the said agreement or otherwise, "the said companies or any

"or either of them surrendered to the said Association "any traffic whatever" (Record, fol. 198).

It may be said, indeed, without further citation, that the answer denied every allegation of unlawful act, or unlawful intent, unless the making of the agreement itself was an unlawful act.

After denying all allegations of unlawful acts or intents other than the mere making of the agreement, the answer proceeds to set forth with minuteness the condition of the railroad traffic to which the agreement was applicable at the time when it was made; points out the successive steps by which that traffic had reached the condition in which it then was; shows that its beneficial features had been reached by conference, agreement and community of arrangement among numerous independent roads, and that such conference and agreement were necessary to the harmonious operation of the different railroad companies, and necessary, as well to the public as to the railroads themselves. It sets forth the enactment of the Inter-state Commerce Act and refers to the important requirements of that Act, and shows that compliance with such requirements involved concerted agreement and harmonious action between the different railroad companies. It further shows that after the passage of the Inter-state Commerce Act, secret, illegitimate and unlawful competition became very prevalent and very mischievous, and in very many instances led to great demoralization in the business of railway transportation, quite as injurious to the public as to the railroads themselves. It points out that the results of such competition were instability in rates, unlawful discriminations and rate wars, the necessary effect of which would be, if prosecuted to the end, to crush out the weaker parties and thereby deprive the public of important and valuable facilites, or throw the control of the weaker lines into the hands of the stronger ones. The substance of the answer in this respect is that the agreement

was designed, not in any manner to destroy legitimate competition, but to destroy irregular and unlawful competition, and to enable the transportation business of the country to be done in accordance with the requirements of the Inter-state Commerce Act.

The complainants set the cause down for hearing upon bill and answer, thereby admitting the truth of all averments of the answer so far as the same were well pleaded. It will not be contended by the respondents that this condition of the pleadings can have the effect to relieve the agreement from the charge of illegality, if it be, in and of itself, necessarily illegal; but, on the other hand, all must agree that unless the agreement is necessarily, and upon its face, illegal, the pleadings do effectually relieve it from any charge of illegality.

The Circuit Court after a full hearing dismissed the bill, and its decree was affirmed by the Court of Appeal. The present appeal is from the decree of affirmance.

The agreement has been assailed upon two grounds; *first*, that it is a violation of the Act of July 2nd, 1890, commonly called the Anti-Trust Act; *second*, that it is a violation of Section 5 of the Inter-state Commerce Law, which prohibits what is commonly called *pooling*. It is to the questions thus raised that the argument of this brief will be directed.

It may seem, at first, that we are aiming to persuade the Court to reconsider its reasonings and determinations in the recent case of the United States *v.* The Trans-Missouri Freight Association. Such an impression would be unfortunate and tend to deprive the respondents of that fair consideration to which they are entitled.

They might ask for such reconsideration if they thought it to be necessary, and could support the request by reasons well deserving attention; but it would be their duty to avow their purpose and make an open request.

It may be that one of the questions now sought to be presented might have been made in that case and a decision of if obtained; but it is quite certain, as it appears to the undersigned, that the question was not raised. This, however, is so important that it should not be assumed, but clearly shown.

The opinion pronounced by Mr. Justice Peckham, after having considered and rejected the argument that the Anti-Trust Act did not apply to railway companies, passes to the vital question whether the agreement in that case was one condemned by the act, and most clearly and explicitly states what it assumed to be the precise nature of the question, in these words:

"SECOND. The next question to be discussed is as "to what is the true construction of the statute, as- "suming that it applies to common carriers by rail- "roads. What is the meaning of the language as "used in the statute, that every contract, combination "in the form of trust or otherwise, or conspiracy in "restraint of trade or commerce among the several "States or with foreign nations, is hereby declared to "be illegal? Is it confined to a contract or combina- "tion which is only in *unreasonable* restraint of trade "or commerce, or does it include, what the language "of the act plainly and in terms covers, *all* contracts "of that nature?" (The italics are ours)

The opinion proceeds to briefly deal with the suggestion that the title of the act is indicative of a purpose to deal only with contracts unlawful at common law, and then states very clearly the main position taken by the defendants in order to show that the contract was not condemned by the act, namely, that the act "only meant to declare illegal any such which is *unreasonable* restraint of trade." It says:

"It is now with much amplification of argument ur- "ged that the statute, in declaring illegal every com- "bination in the form of trust or otherwise, or con-

" spiracy in restraint of trade or commerce, does not " mean what the language used therein plainly im- " ports, but that it only means to declare illegal any " such contract which is in *unreasonable* restraint of " trade, while leaving all others unaffected by the " provisions of the act; that the common law mean- " ing of the term contract in restraint of trade in- " cludes only such contracts as are in *unreasonable* " restraint of trade, and when that term is used in the " Federal statute it is not intended to include all con- " tracts in restraint of trade, but only those which are " in unreasonable restraint thereof."

The opinion then immediately passes to its conclusion adverse to this contention, saying that

"By the simple use of the term contract in restraint " of trade, all contracts of that nature, whether valid " or otherwise, will be included, and not alone that " kind of contract which was invalid and unenforceable " as being in unreasonable restraint of trade When, " therefore, the body of an act pronounces as illegal " every contract or combination in restraint of trade " or commerce among the several States, &c , the plain " and ordinary meaning of such language is not limited " to that kind of contract alone which is in unreason- " able restraint of trade, but all contracts are included " in such language, and no exception or limitation can " be added without placing in the act that which has " been omitted by Congress."

The learned Judge then alludes to the opinions in the courts below holding the contracts valid, and points out the method of reasoning adopted by those courts, describing it thus:

" Proceeding, however, upon the theory that the " statute did not mean what its plain language im- " ported, and that it intended in its prohibition to " denounce as illegal only those contracts which were

" in unreasonable restraint of trade, the courts below " have made an exhaustive investigation as to the " general rules which guide courts in declaring con- " tracts to be void as being in restraint of trade, and " therefore against the public policy of the country."

It then condemns this method as reading into the text of the act an exception without sufficient reason, saying:

" But we cannot see how the statute can be lim- " ited, as it has been by the courts below, without " reading into its text an exception which alters the " natural meaning of the language used, and that, " too, upon a most material point, and where no " sufficient reason is shown for believing that such " alteration would make the statute more in accord " with the intent of the law-making body that en- " acted it."

The opinion then proceeds to describe the argument in support of the agreement more minutely, and, particularly, that part of it which dwells upon the mischievous and ruinous character of railroad competition, and the necessity, in the public interest, of limiting it so as to enable reasonable rates to be secured, and insists that Congress could not have intended to make agreements criminal which had such a reasonable object. It admits the force of these arguments, but regards them as applicable rather to the *policy* of the act. It adds, however, that there are considerations which have some tendency to modify this view; such as the difficulty of laying down a standard of reasonableness, the public nature of the business of railroads, &c., and suggests that unanimity of opinion does not exist on the subject, and, consequently that it cannot be so strongly argued, as it might otherwise be, that Congress could not have intended to make all such agreements criminal. Its language on this point is as follows:

"We recognize the argument upon the part of the "defendants that restraint upon the business of rail- "roads will not be prejudicial to the public interest "so long as such restraint provides for reasonable "rates for transportation and prevents the deadly "competition so liable to result in the ruin of the "roads and to thereby impair their usefulness to the "public, and in that way to prejudice the public in- "terest. But it must be remembered that these "results are by no means admitted with unanimity; "on the contrary, they are earnestly and warmly "denied on the part of the public and by those who "assume to defend its interest both in and out of "Congress. Competition, they urge, is a necessity "for the purpose of securing in the end just and pro- "per rates."

The opinion then proceeds with a somewhat lengthy review of cases, and with arguments, tending to show that there is a widely extended conviction or belief adverse to the policy of such agreements, and it then reviews the situation, and, in the clearest manner, *re-states the precise question* which the Court was called upon to decide.

"As a result of this review of the situation, we find "two very widely divergent views of the effects which "might be expected to result from declaring illegal all "contracts in restraint of trade, etc.; one side pre- "dicting financial disaster and ruin to competing rail- "roads, including thereby the ruin of shareholders, "the destruction of immensely valuable properties, "and the consequent prejudice to the public interest; "while on the other side, predictions equally earnest "are made that no such mournful results will follow, "and it is urged that there is a necessity, in order "that the public interest may be fairly and justly "protected, to allow free and open competition

" among railroads upon the subject of the rates for
" the transportation of persons and property.

" The arguments which have been addressed to us
" against the inclusion of all contracts in restraint of
" trade, as provided for by the language of the act,
" have been based upon the alleged presumption that
" Congress, notwithstanding the language of the act,
" could not have intended to embrace all contracts,
" but only such contracts as were in unreasonable re-
" straint of trade. Under these circumstances we are,
" therefore, asked to hold that the act of Congress
" excepts contracts which are not in unreasonable re-
" straint of trade, and which only keep rates up to a
" reasonable price, notwithstanding the language of
" the act makes no such exception. In other words,
" we are asked to read into the act by way of judicial
" legislation an exception that is not placed there by
" the law-making branch of the Government, and this
" is to be done upon the theory that the impolicy of
" such legislation is so clear that it cannot be sup-
" posed Congress intended the natural import of the
" language it used."

It then reiterates its conclusion briefly stating the gronnds upon which it was based:

" This we cannot and ought not to do. That im-
" policy is not so clear, nor are the reasons for the ex-
" ception so potent as to permit us to interpolate an
" exception into the language of the act, and to thus
" materially alter its meaning and effect. It may be
" that the policy evidenced by the passage of the act
" itself will, if carried out, result in disaster to the
" roads, and in a failure to secure the advantages
" sought from such legislation. Whether that will be
" the result or not we do not know and cannot pre-
" dict. These considerations are, however, not for
" us. If the act ought to read as contended for by
" defendants, Congress is the body to amend it and

" not this Court, by a process of judicial legislation " wholly unjustifiable. Large numbers do not agree " that the view taken by defendants is sound or true " in substance, and Congress may and very probably " did share in that belief in passing the act. The " public policy of the Government is to be found in " its statutes, and when they have not directly spoken, " then in the decisions of the courts and the constant " practice of the Government officials; but when the " law-making power speaks upon a particular subject, " over which it has constitutional power to legislate, " public policy in such a case is what the statute en- " acts. If the law prohibit any contract or com- " bination in restraint of trade or commerce, a con- " tract or combination made in violation of such law " is void, whatever may have been theretofore de- " cided by the courts to have been the public policy " of the country on that subject."

There can be no manner of doubt what the precise question was which was considered and determined in the case above referred to. It was this: *Assuming* that the agreement was one in *restraint of trade*, would the circumstance that the restraint actually imposed by it was *reasonable*, relieve it from the condemnation of the statute? Or, in other words, does the statute, by a true construction condemn *all* agreements in restraint of inter-state trade, and commerce, or such only as were at common law unlawful?

There are some observations made in the opinion, after the close of the discussion of what was regarded as the main question which, if taken apart from the main body of the opinion, might indicate that, the Court regarded the question before it as being whether the agreement *in fact* restrained trade or commerce. These observations are as follows;

" Although the case is heard on bill and answer, " thus making it necessary to assume the truth of the

" allegations in the answer which are well pleaded,
" yet the legal effect of the agreement itself cannot
" be altered by the answer, nor can its violation of
" law be made valid by allegations of good intention
" or of desire to simply maintain reasonable rates;
" nor can the plaintiffs' allegations as to the intent
" with which the agreement was entered into be re-
" garded, as such intent is denied on the part of the
" defendants: and if the intent alleged in the bill
" were a necessary fact to be proved in order to
" maintain the suit, the bill would have to be dis-
" missed. In the view we have taken of the question
" the intent alleged by the Government is not neces-
" sary to be proved. The question is one of law in
" regard to the meaning and effect of the agreement
" itself, namely: Does the agreement restrain trade
" or commerce in any way so as to be a violation of
" the act? We have no doubt that it does. The
" agreement on its face recites that it is entered into
" 'for the purpose of mutual protection by estab-
" lishing and maintaining reasonable rates, rules and
" regulations on all freight traffic, both through and
" local.' To that end the association is formed and a
" body created which is to adopt rates, which, when
" agreed to, are to be the governing rates for all the
" companies, and a violation of which subjects the
" defaulting company to the payment of a
" penalty, and although the parties have a right to
" withdraw from the agreement on giving thirty
" days' notice of a desire so to do, yet while in force
" and assuming it to be lived up to, there can be no
" doubt that its direct, immediate and necessary
" effect is to put a restraint upon trade or commerce
" as described in the act.

" For these reasons the suit of the Government can
" be maintained without proof of the allegation that
" the agreement was entered into for the purpose of
" restraining trade or commerce or for maintaining
" rates above what was reasonable. The necessary

" effect of the agreement is to restrain trade or com-
" merce, no matter what the intent was on the part
" of those who signed it."

What is thus said, however, was, as appears by the language itself, in response to the argument founded upon the allegations in the answer concerning the innocent and even laudable *intent* with which the agreement was entered into. It was to repel the suggestion that the necessary import of the agreement could be changed, or affected by the intent of the parties in making it.

To infer from this language that the Court had seriously considered, or supposed it necessary to consider, whether the agreement was *in fact* in restraint of trade at all when it had previously stated, and more than once repeated, that the question argued and submitted to it was whether the statute condemned contracts in restraint of trade where the restraint was reasonable, and had debated that question so minutely and at such length, would be imputing an inconsistency. Doubtless the Court regarded the contract as being in fact in restraint of trade. The nature of the argument submitted justified this; and it is doubtless also true that the provisions of the contract stamped it, in the view of the Court, as of that character; but no question, at least none of such moment as the present one, can be regarded as considered and determined by a court, upon which, in its view, it has a concession covering the whole ground, and which it evidently deems not open to contestation.

Of course, in the foregoing observations designed to point out the real question determined by the Court in the case referred to, no criticism is intended. Courts can hardly be expected to decide cases upon questions not submitted and argued. Whenever such a course is followed complaint is apt to be made, or at least dissatisfactifon elt.

Whether it was prudent or expedient that counsel for the defendants in that case should have adopted a line of argument implying a concession that the agreement with which they were concerned actually was in restraint of trade is not matter for observation here; nor is it important to consider here whether that contract actually was one in restraint of trade. What we are now seeking to elucidate is the *rationale* of the decision—the precise question before the Court and the manner in which it was determined.

It is not wholly out of place, however, to suggest that the case might have assumed, in the view of the Court, a very different aspect had it been argued without the assumption that the agreement was in restraint of trade. The difficulty which the Court found in yielding to the argument on the part of the defendants was that it called upon the Court to declare that Congress did not mean what it had said, and that the word *unreasonable* should be *read into* the act in order to arrive at its real meaning. The Court did not intimate that this was impossible; and it fully admitted the force of the defendants' argument that Congress could not be regarded as having intended to convert into crimes agreements entirely innocent, and which had been repeatedly declared by the most intelligent, legal as well as economical opinion to be beneficial. There is reason to suppose that this argument would have been held sufficient, as it was in the case of Trinity Church *vs.* The United States (143 U. S., 457), if all opinions on this point had been unanimous. The insufficiency which the Court found with this argument was that opinions upon this subject were not unanimous; that there was a difference of view, it having often been asserted in popular and legislative discussions, that similar agreements were mischievous and opposed to the policy of the law. The Court did not feel that it could say with confidence that the legislation did not proceed upon an adoption of such views. Whoever calls upon a Court

to read into a statute important words not found there, assumes the burden of showing that such a construction is necessary in order to relieve the legislation from the imputation of an absurdity. The Court accordingly held that the elaborate arguments of the defendants, the force of which was fully admitted, showing the *reasonableness* of the agreement were out of place, for the reason that these views were not universally admitted.

But if the Court had regarded the question as being whether the particular agreement really was in restraint of trade, the nature of the inquiry would have been radically changed. The *actual character* of the agreement, its *purpose*, and its *necessary effect*, would then have become the points of direct consideration, and if it could have been shown that it did not in any just sense restrain trade at all, but on the contrary, advanced and promoted it, and that it was an arrangement essentially necessary to the proper conduct of the transportation business of the country, and moreover that such agreements had very seldom, if ever, been regarded by Courts or intelligent economists as in any way prejudicial to trade, the final question would have been whether such agreements were *within the class* of contracts in restraint of trade denounced by the statute. The defendants would no longer have been under the burden of showing that the word "*unreasonable*" should be read into the statute; but the plaintiffs would have been under the much greater burden of showing affirmatively that agreements really promotive of trade, and generally recognized as such, could be embraced among agreements "in restraint of trade." The weighty presumption that a legislature must not be taken as intending to convert innocence into crime would, of itself, have been conclusive against the contention.

There are certain observations in relation to the Anti-Trust Act which are properly to be made before proceeding to the argument.

There is no doubt that prior to and at the time of the passage of this law there were, as there still are, certain tendencies in the industrial world which drew widespread attention and excited, in some minds, much alarm. Many industries were seen, or supposed, to be under the control of great aggregations of capital, either in the hands of individuals united under some form of agreement, partnership or other, or contributed as the capital of corporate bodies. Some of the most conspicuous were called by the vague name of *trusts*, and this term came to be employed, in a general way, to designate all of them. For obvious reasons, and quite aside from the question whether their objects and effects are mischievous or beneficial, such combinations of capital are not popular, and the designation "trust" came to be a rather reproachful one.

Undoubtedly it may be possible for a large aggregated capital to wield a greater power in many ways than would be possible for the same amount distributed among many separate owners or managers, and the suspicion was entertained that such power was employed in controlling markets, and perhaps in controlling legislation, and it was also thought to be an instrumentality by which the unequal distribution of wealth was fostered and increased. The disfavor thus excited was, as was natural, turned to political account. Those opposed to a protective tariff charged upon its advocates that they were favoring and stimulating trusts, and the latter felt the need of repelling the charge by doing something to show that they were the declared enemies of trusts.

Under such circumstances it was quite natural that schemes of legislation aimed against these supposed public enemies should be started, and any opposition to them would naturally draw upon the authors of it the reproach that they were the friends and, perhaps, the paid defenders, of these powerful interests.

While, therefore, all, or nearly all, professed them-

selves in favor of repressive legislation, the question what legislation could be contrived was a difficult one and suggested some difficult questions. How was a *trust* to be legally defined so that a prohibition of it should not include a prohibition of the exercise of the clearest constitutional rights? Congress, surely, could not prevent the creation of corporations under State laws, or limit the capacity of forming partnerships, or in any manner interfere with the internal business of States. And was it certain that these so-called *trusts* were, in every instance, necessarily mischievous? Indeed, sensible legislators for the most part understood very clearly that the things complained of were but the necessary incidents and consequences of the progress of industry and civilization and could not be arrested without checking the advance of the nation and crippling it in the fierce competitions with other nations, and that any useful effort to remedy the supposed evils must be directed against the abuses of the power of aggregated capital and not at the aggregations themselves. Under these circumstances Congress proceeded very cautiously and enacted the only measure which seemed possible without passing the plainest constitutional limits. It did not attempt to define "trusts," or limit aggregations of capital in any form. The general *charge* was that these combinations were in some form *monopolies*, and *in restraint of trade*, but Congress did not in the remotest degree attempt to define what a monopoly or restraint of trade was. It was, however, perfectly safe to declare that if these combinations did in any case create monopolies, or restraints upon trade, they should be prohibited from so doing in the future; and this is what Congress did and all it did, by passing the act in question. It prohibited contracts and combinations to create monopolies or restrain trade, and left it to the courts, without a word of direction or instruction, to determine what contracts did create monopolies or restrain trade, and what did not.

It cannot be said that Congress has done an unwise or imprudent thing, and that if calamity occurs the fault lies at its door. It has prohibited nothing but contracts and combinations to create restraints of trade and monopolies. These, when properly defined, are, beyond question, public mischiefs and ought to be prohibited. If any useful thing becomes stricken down by the law, it must be the result of some erroneous interpretation.

The first question we design to consider is whether the agreement violates any of the provisions of the Act referred to. To this end it is of much importance to have in mind the particular nature of the subject with which this Act deals, and how that subject has heretofore been treated in law and legislation.

It is immediately obvious that Congress conceived itself to be dealing with acts supposed to be productive of injury to the public, and of injury to such an extent as to justify repressive legislation.

We next observe that it is not *contracts* only of a certain character which are condemned, but that they are coupled together with certain other acts, presumably of a similar nature or tendency, namely, *combinations* or *conspiracies* in restraint of trade, and *monopolies*, or *combinations* or *conspiracies to monopolize*. Contracts, therefore, are dealt with, not so much as *contracts*, but as one form of *acts* relating to trade and commerce assumed to be injurious in their tendency and effect.

That contracts of a certain class may be opposed to a sound public policy has been recognized in the law from a very early period. The grounds or reasons of policy upon which they are held void or illegal are very numerous and varied, but a class embracing numerous instances is formed of such as are supposed to have an injurious effect upon trade or commerce; between these, however, there is quite a marked distinction observable in the way in which they are treated in the law. One description em-

braces simply ordinary business transactions, where parties make agreements with each other for supposed mutual profit and advantage, a breach of which would result in pecuniary loss or damage to the one or the other, and a demand for redress. In such cases the parties expect and intend to enforce the contract, and look to the ordinary legal remedies as the means of enforcing it. Contracts whereby a business is sold and the seller covenants that he will not thereafter carry it on, or where a man takes an apprentice with an agreement that he will not set himself up in opposition to his master in trade, supply familiar instances of this character.

Inasmuch as such contracts would not be entered into unless it was believed that the law would afford redress in case of a breach of them, the repressive purposes of the law, where they are supposed to be opposed to public policy, are, in general, fully satisfied by declaring them void and denying redress, and this is usually the extent of the notice which the law takes of them. There is no occasion for criminal legislation, both for the reason that there is not present, ordinarily, any criminal purpose, and if there were, repression is sufficiently accomplished without a resort to it. The doctrine respecting contracts of this character belongs therefore to the law of *contracts*, and the treatises on that law usually embrace a chapter devoted to it.

But there is another and much smaller description of contracts supposed to be injurious to trade of quite a different character. They are not, properly speaking, *business transactions*. They do not involve the sale, leasing or exchange of property, or the hire of services; nor does a breach of them usually result in distinct and ascertainable pecuniary loss. They are not, indeed, entered into by parties in different interests, as in the case of buyer and seller, one of which expects to gain something from the other, but by parties in the same interest having in view an object

for the common good of all; nor do the parties to them generally look to, or rely upon, any legal remedies to secure obedience to them. They spring out of circumstances which impress the parties to them with the belief that they have a *common interest*, or that it is expedient to create a common interest among them, and seek to control or regulate the conduct of each other in relation to business. Instances of this description of agreement are found where laborers, or employers, unite, in the form of agreement, to regulate hours of labor, or prices, or where merchants, or tradesmen, combine to transact their business in certain prescribed ways, or to establish uniform prices for their goods, or to surpress, or regulate, competition among themselves; or where a class of producers or dealers combine together to control a product, or a business, with a view of imposing upon others their own terms as to prices, or other incidents of the business.

The marked distinction between these cases and the ordinary business transactions first spoken of is that in the latter there is a *difference of interest*, sometimes regarded as a *hostility* of interest between the parties, each seeking to gain the utmost from the other; whereas, in the former, the parties are in the *same* interest, each seeking the *same* end. The term *contract* does not well express this sort of agreement. It is a uniting together for a common purpose—a *combination*—or, when thought to be of an objectionable character, a *conspiracy*. Such unions always suppose agreement, but it need not be in writing; where it is in writing it is often called an agreement, or contract; but, in giving it this name we should not lose sight of its real character. In reality it is simply an *act*, and innocent, or guilty, according as the law may be inclined to regard it.

It is manifest that where the law does regard it as mischievous, and to such a degree as to call for re-

pression, it is not enough to simply declare it illegal. The practice may, nevertheless, be persisted in, and as it does not rely for its efficacy upon legal remedies, the mere withholding of such remedies may be ineffectual. The action, therefore, which law usually takes in respect to such so-called contracts is in the form of *prohibition* and *penalty*, and the subject belongs not to the law of *contracts*, but to the criminal law, where it is usually dealt with under the head of *conspiracy*.

We do not mean by the above observations that there may not be instances which partake, to a greater or less degree, of the qualities of both the classes above mentioned; but the distinction between them is so constant and pervading that it will be at once recognized.

As a conclusion to what is said we desire to point out that the legal doctrine and policy to which this Anti-Trust act belongs, is manifestly the one last described. The circumstance that *contracts* are grouped together with *combinations* and *conspiracies* and made the subject of *criminal* treatment, shows this very plainly.

The ineptitude of some of the language of this legislation is quite apparent. Undoubtedly the object of Congress was to reach that class of supposed mischiefs which flow from *combinations*. But the great bulk of the cases, probably nine-tenths, in which Courts have felt called upon to say anything about *contracts in restraint of trade*, has been the business transactions first alluded to in which an agreement has been entered into, not to exercise a particular calling, as where the keeper of a well patronized tavern sells out his establishment and good will, and covenants not to further carry on the business. Such agreements at the common law have been held valid or void according to the supposed reasonableness of the covenant; but, surely even when void, there was nothing about them calling for the intervention of the

criminal law. And yet this statute bunches the valid and the void all together, and makes them all criminal, when probably there was not the remotest intention to make any of them criminal.

These observations, of course, fully admit that the particular agreement or combination against which this action is aimed, would be, assuming that the act covers contracts between railroad companies, obnoxious to the penalty imposed by the act, provided it were, *in fact*, in restraint of trade or commerce between the states. That it is, *in fact*, in restraint of trade or commerce must be shown before this action can be maintained, and this is the proper subject for discussion in this action. This question is broadly open and unaffected by any decision of this Court, and we expect to be able to show that the agreement is, not only not in restraint of trade and commerce, but highly beneficial to both; that Congress has never declared, or intended to declare it criminal, and that it is deserving, not of judicial condemnation, but of judicial encouragement and approval.

Unless the act is subject to the interpretation hereinafter maintained, it is open to grave objection on constitutional grounds, which will be dealt with by other counsel.

FIRST POINT.

The Court has no jurisdiction to entertain this suit, unless it can be found in the provisions of some statute.

1. The bill sets forth simply the commission of a misdemeanor, and an intention on the part of the defendants to repeat the offense. No principle of the public remedial law of America or England is more fundamental than that the ordinary administration of criminal justice by the ordinary Courts of Common Law, is sufficient for the repression of crime, and exclusive adhesion to it necessary for the protection of the citizen.

2. This *ordinary* administration of the law of the land by the *ordinary* Courts of the land has been, from the first, the main stronghold of the lovers of constitutional liberty. It is the source of the extreme jealousy with which the methods of the Court of Chancery and the canon law, with their discretionary remedies, injunctions, positive commands and contempts, were ever regarded in England. The *friends* of our national Constitution were never able to answer the objections of its enemies founded upon the absence of guarantees against the introduction of these hated methods; and their first work after the adoption of the Constitution was to amend it by introducing those guarantees. Trial by jury was secured both in civil and criminal cases. It was made *impossible* for the legislative power to ever authorize the holding of any man to answer for a capital or otherwise infamous crime, unless on presentment or indictment by a grand jury. Can we suppose that the value of an adherence to these fundamental principles throughout the whole system of

remedial procedure was lightly esteemed, because it was not thought necessary or expedient to extend the constitutional safeguards to every offense?

3. In consonance with this deeply-seated conviction it has been uniformly held that Courts of Equity have no jurisdiction "to restrain the commission of crimes or to enforce moral obligations and the performance of moral duties; nor will they interfere *for the prevention of an illegal act merely because it is illegal.*"

High on Injunctions, § 20.

a. The precise question arose in the case of the Attorney-General *vs.* The Utica Insurance Co. (2 Johns. Ch., 371). A statute of New York prohibited the transaction of the business of banking except under certain conditions, and punished a violation of the act by imposing a penalty of $1,000. The Attorney-General filed an information in chancery, alleging a violation of the act and a continuance therein, and seeking for an injunction. Chancellor Kent held that the Court was without jurisdiction. He declared that he had searched in vain for the exercise of such a power, and that the precedents were all against it.

b. Has the law been changed? We know of no case which can be referred to indicating a change. On the contrary, the rule has been recently affirmed by the highest authority. Mr. Justice Brewer in giving the opinion of the Court in *In re* Debs (58 U. S., 564, 593), says, "Again it is objected that it is outside of the jurisdiction of a Court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A Chancellor has no criminal jurisdic-

tion. Something *more* than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the Court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature; but when such interferences appear, the jurisdiction of a Court of equity arises, and is not destroyed by the fact that they are accompanied by, or are themselves, violations of the criminal law."

In the case at bar nothing whatever is alleged *except the mere violation of the law and the intent to continue it.* It is not alleged that such violation does, or will, in fact lead to the imposition of any unjust or unreasonable charge for the carriage of merchandise, or any unjust discrimination, or in any way diminish or impair any facilities for carrying on interstate commerce. Indeed, the avowed, and the apparent, purpose of the agreement is to secure justice, equality and improvement in interstate transportation, and this purpose stands admitted. All that is averred in the bill is that the method chosen to accomplish the purpose is prohibited by penal law.

c. It is contended that Courts of equity may interfere by injunction to suppress *nuisances.* This is true, but it would be a gross perversion of language to call the alleged offense in this case a *nuisance.* It is no more a nuisance than any other misdemeanor. But if it were a nuisance, equity can only interfere when a case of *necessity* is shown. It must appear that there is some present mischief so grave that an immediate remedy is demanded, and that the *ordinary* administration of justice would be ineffectual. The opinion of the Supreme Court in the case last above mentioned is conclusive upon this point. It asserted the jurisdiction of the Court in *some* cases of nuisance, but at the same time declared that a necessity for its exist-

ence must be shown. The bill filed in that case set forth the facts which constituted the necessity, and which made out in the opinion of the Court a special exigency of the most imperious nature. In the present case, no such exigency is shown, or pretended.

SECOND POINT.

The Anti-Trust Act contained provisions purporting to create a jurisdiction in equity to give relief by way of injunction; and, perhaps, the decision made by this Court in the suit of the United States vs. The Trans-Missouri Freight Association, should be regarded as a determination that the Attorney-General was at liberty in case of any violation of the provisions of the act to file a bill for an injunction, although it would seem necessary, upon familiar principles, to make out a case for equitable interposition, in order to justify an appeal to the equitable jurisdiction thus created. But so far as it is sought to maintain the present action on the basis of an alleged violation of the provisions of the Interstate Commerce Act, no support can be derived from the decision above referred to. No such jurisdiction in equity is given by that act. And by implication, at least, it is withheld; for in certain cases specially mentioned in Sections 6 and 13, jurisdiction is expressly given to courts of equity to grant

injunctions. If it is not given in other cases it must be taken to be for the reason that it was not intended. "Expressio unius est exclusio alterius."

1. It may be pointed out that Section 12, as amended by the act of February 10, 1891 (26 Stat., 743), made it the duty of the District Attorneys "to institute in the proper Court and to prosecute under the direction of the Attorney-General of the United States *all necessary proceedings* for the enforcement of the provisions of this act and for the punishment of all violations thereof." But to rely upon this provision is to rely upon *implication*, when unequivocal language is required. And, if implication were permitted, it would be wholly insufficient, for this language *expressly* observes the distinction everywhere made by our law in reference to procedure as above insisted upon. If it allows suits for injunction at all, it allows them only when *necessary;* and they cannot be necessary, unless a case is made showing that the *ordinary* course of the law would be unavailing.

4. Moreover, such action can be instituted only by *the* District-Attorney, *to whom the Commission shall apply, and whom it shall request* to institute it. No such application or request is averred.

5. And, finally, the Commission upon any just interpretation of the Interstate Commerce Law cannot call upon any District-Attorney to act until it has exhausted *its own very express and particular powers* conferred upon it for *the very purpose of avoiding the necessity* of any other form of enforcing the law.

A scrutiny into the main provisions of the law will make this quite clear. In general, governments content themselves with the *enactment of laws*, general or particular, as the case may require, and leave to individuals the responsibility of shaping their conduct and their business in conformity with them, and do not subject them to the especial observation, supervision and direction of officials. The *public nature*, however, of the business of common carriers by railroad, and the importance of the subject of Interstate transportation by rail, have been regarded as justifying a system of *special supervision*.

To this end the Interstate Commerce Act, besides enacting certain legal rules, most of them pre-existing as part of the common law, devised certain *administrative* regulations and created an *administrative board* charged with the duty of seeing that they were carried into effect, and charged also with the duty of observing the operation of the system and securing in it a conformity to the law. The contemplation was that this Commission should keep in easy communication with both carriers and shippers, settle differences between them, and prescribe modes of doing the business suited to its various exigencies and conformable to law. No strictly *judicial* power was given to it. Legal learning was not made a qualification for the office, and though it was authorized to make orders of various kinds, and required to observe judicial methods in forming its conclusions as to orders proper to be made, no power was given to it to enforce such orders directly. To the end of such enforcement it was permitted and required to resort to the judicial tribunals, and in these the controversy, if any, was to be tried *de novo*, a *prima facie* weight, however, being, constitutionally or unconstitutionally, assigned to its previous findings on matters of fact.

By the original act such resort to the Courts could be had only in the following cases:

First.—To compel carriers to file with the Commission, and publish in the manner prescribed by the act, their schedules or tariffs of rates, and for this purpose a mandamus or an injunction might be issued (§ 6).

Second.—To compel the attendance of witnesses and the production of books, papers, &c., before the Commission (§ 12).

Third.—When the Commission had made any lawful order or requirement upon any carrier, and compliance therewith had been neglected or refused, the Courts might be appealed to, either by the Commission or by an interested party, to affirmatively enforce it, and in such cases the Courts were authorized to enforce it, by a "writ of injunction or other proper process, mandatory or otherwise" (§ 16).

By the original act, no suit or prosecution in the name of the United States was authorized to be instituted at the instance of the Commission. The act denounced penalties for the violation of its provisions, and, of course, the enforcement of these was a proper part of the duty of the United States Attorneys as in other cases.

A very unique feature of the original act is to be particularly noticed. It was apparently designed to do away with the necessity of a resort to *any Court*. Complaint might be made by any private person or corporation, or by any public corporation or municipality, against any carrier of being injured, which complaint the carrier might be called upon either to satisfy or answer. If he satisfied it, that was the end of the matter; if not, an *investigation* by the Commission was required; and such investigation might be instituted on the request of any Railroad Commission of any State or Territory, and also on the mere motion of the Commission. The result of the investigation was to be declared by a report which might determine that some law had been violated, with, or

without, damage to any person or corporation, whereupon notice was to be given by the Commission to the offender requiring the violation to be discontinued, and the injury inflicted, if any, to be repaired within a reasonable time specified in the notice. If this injunction was complied with, the carrier was thereupon to be relieved from any further *liability to the party injured, or penalty*.

The purpose seems to have been to constitute a body which should occupy such an intimate and friendly relation both to carriers and to shippers that its intervention would be habitually called upon in cases of disagreement, and appeals to the Courts for the purposes of redressing either private or public injuries would become less necessary. (Sections 9, 13, 14, 15 and 16.) This is the more evident from the circumstance that while private suits for damages in the ordinary Courts are given in case of any violation of the provisions of the act, both remedies could not be pursued. An election was required. (Sec. 9.)

Prior to the amendment of Sec. 12 in 1891, as above mentioned, it is plain that the Commission was not authorized to direct, promote or request any action by any District Attorney to enforce the law or punish its violations. Whatever judicial power was to be invoked was to be applied for by itself in its own name, or, where private persons were interested, in their names.

The amendment was evidently adopted, not to supersede or displace the prior provisions, but to supplement them. The design was to arm the Commission with additional powers to enforce the law.

It appears, therefore, that for the enforcement of the provisions of the Interstate Commerce Act, the Commission is clothed with *two* entirely distinct authorities. One is to bring about by its own action a peaceful conformity with the law; the other is, when this fails, to set the remedial process of the law in motion. The first contemplates an *investigation and*

report by the Commission in case of anything done by any common carrier subject to the provisions of the act "*in contravention thereof*," and this either at the instance of others, or upon its own motion; and in case of an adverse report, to give the carrier *notice* to discontinue his offence and make reparation for any injury inflicted; and compliance with the notice puts an end to any civil or criminal liability. Such a result must, from its very nature, and from the order in which it stands in the legislation, be taken to be the one *preferred*, and, therefore, the duty is cast upon the Commission to *first* try to bring it about.

With what propriety can the Commissioners compel *other* public officers to take steps to right wrongs by the measures of force and punishment, when there is a *peaceful* method specially contrived and lodged with them which they have not tried?

The law evidently assumes that there may be *unconscious* violations of its provisions by carriers. What an unjust discrimination between shippers may be is a question upon which honest men may differ. It depends upon whether the service performed in different cases is the *same* and rendered under the *same circumstances*. The service can never *literally* be the same, or rendered under the same circumstances. The carriers may honestly think that cases are substantially different and justify a different charge; but a jury may think otherwise, and liability to fine and imprisonment be declared where there was no guilty intent. If the carrier were apprised by an impartial and enlightened board that they thought him in the wrong he would probably acquiesce. The law was plainly framed to save innocence in such cases.

If several carriers are accused of discrimination, the Commission, on the view the government must support, are at liberty to incite the District Attorney to punish *one* with utmost rigor of the law, and shield and protect the *others* from any punishment whatever. Are such discretions anywhere lodged in our law with

any public officers? Surely, before the conclusion is reached that they are, it must appear impossible to find any other interpretation consistent with the language employed.

Where mild and severe remedies are prescribed for the same offense, we must, in reason, say that the former should be resorted to before the latter.

It may be suggested that where an agreement apparently violating the law is openly filed by carriers, there can be no need of an investigation. The true statement is, not that there is no need of investigation, but that the task is extremely easy. The case of United States *vs.* Missouri Pac. Ry. Co., 65 Fed. Rep., 903, is not a binding authority, and should not be followed. But the point presented here was not made in that case.

THIRD POINT.

A clear understanding should be had at the outset, of the meaning of the terms with which we are dealing. The class of contracts condemned by the Anti-trust act is defined by the EFFECT they have upon trade or commerce. They are such, and such only, as have the EFFECT of restraining trade or commerce. The ACTUAL EFFECT which the contracts have upon trade or commerce is the material consideration which determines whether or not they are included within the class.

1. This may seem self-evident, and indeed is so. But the possible suggestion might be made that there

is a class of contracts, *called*, or *named*, "contracts in restraint of trade," and that the statute relates to these irrespective of their real and true effect. There is no foundation for such a suggestion. There is no class of contracts known to the law by the name of contracts in restraint of trade irrespective of their actual effect upon trade. Whenever, heretofore, the point has been made in the case of a particular contract whether it was in restraint of trade, it has been determined by an inquiry as to its actual effect upon trade. No suggestion would have been indulged that it was valid or void according as it might, or might not, be *called* or *styled* a contract in restraint of trade.

2. Moreover we are dealing with the *criminal* law which never classes acts and makes them punishable under arbitrary names, without regard to their supposed effects, as being actually mischievous or otherwise. This would be putting innocence on a par with guilt.

And, besides, the fundamental requisite of that law is the definition of offences is *certainty*. If we take the class of contracts in restraint of trade as embracing those, the actual effect of which is to restrain it, the meaning is entirely certain, and limits and directs the inquiry in the case of any contract to the single point of ascertaining whether its effect upon trade is *restraint*, which is the very thing the law intends to repress. But if we were to assume that there was a class of contracts *known* or *called* contracts in restraint of trade, irrespective of their actual tendency, the question whether any particular contract was punishable under the act would involve the inquiry simply what the *designation* of the contract was, and not what its actual effect was, the consequence of which would be that the act would be wholly void for *uncertainty;* or, if

not this, that some contracts would be made punishable in which there was no trace of public mischief, and others would escape punishment which in their effects were distinctly mischievous.

3. Doubtless there are certain contracts which readily *come to mind* where contracts in restraint of trade are spoken of, and which may therefore be taken as good examples of the class. They are such as directly *purport and assume* to restrain trade, and which, consequently, do, in some sense and degree, at least, necessarily restrain it. Examples of these are to be found in the instances of such contracts as were considered in the leading case of Mitchell *v.* Reynolds (1 P. Wms., 181), where the condition of the bond in suit was not to keep a victualling house or vend liquor within certain limits, or during a certain time, and in Davis *v.* Mason (5 T. R., 118) where a surgeon agreed with A. not to practice his profession for fourteen years within ten miles of where A. lived, and in very numerous other cases of similar agreements. If there could be said to be any class of contracts known and called by the *name* of contracts in restraint of trade it would be these which do, *in terms*, restrain it.

But if these were to be taken as constituting the class, the agreement we are now dealing with would, very clearly, not belong to it. Agreements for combinations among persons engaged in the same employment to promote their supposed interests, as of laborers or employers, or merchants or trades-people, have rarely, if ever, been styled agreements in restraint of trade. They do not, in general, purport or assume to restrain it. They may, in effect, *actually* restrain it, and thus be brought under the condemnation of the statute, when interpreted, as it ought to be, as apply-

ing to all such contracts, as *actually* restrain trade and no others.

4. There may be occasional instances in which agreements of the character last mentioned have been spoken of as being in restraint of trade. They are, however, rare, and, under the fundamental rule which enjoins *certainty* in the criminal law, the statute could not be held as intending to include in a class of acts which it makes criminal any acts as to which there may be any doubt whether they are ordinarily understood as belonging to the class. How should any person know that a contract which does not purport or assume to restrain trade, and which may not in fact restrain it, belongs to a class designated as contracts in restraint of trade. The case is quite different if the contract *in fact* restrains trade. That is a thing of public mischief, and every one may properly be required to take notice of the effect of agreements to which he becomes a party.

It follows, therefore, that it is only by adopting the definition of the term contracts in restraint of trade which is herein insisted upon that the agreement under notice can be brought within the class.

5. If we consider, as we should, the branch, or department of criminal legislation to which this statute belongs, it will appear still more clearly that the *class* of contracts or combinations which it condemns is those, and those only, which restrain trade *actually*, and *as a whole*.

In the interpretation of criminal legislation it is necessary to have constantly in view what criminal law really is, what objects are sought to be gained by it, what branch or subject of that law the particular statute

deals with, and how that subject had previously been dealt with by the law. In other words, the true principles of criminal legislation are to be kept in mind, and in any cases of doubt we are to assume that the legislature has designed to act in accordance with such principles. If these rules are disregarded, and an interpretation adopted founded exclusively upon the naked language employed taken by itself, the legislature would often be held to have converted innocent and useful practices into crimes.

Applying these rules we perceive that the whole purpose and object of Congress was not to make any *acts*—we mean *acts* as distinguishable from *attempts* — criminal, but only *combinations* and *conspiracies to do them*. The object was not to stamp and punish as a crime anything which *one man alone* might do, but *combinations and conspiracies* to do certain things. The penal enactment against *monopolizing* contained in the second section does not call for any qualification of the foregoing statement. The purpose and meaning of that are too indefinite. In its original meaning a monopoly was an exclusive privilege of dealing in a certain thing acquired by royal grant, of which nothing remains among us except patent rights. This cannot have been intended.

6. But it is needless to prolong this particular discussion. The opinion of this Court in the case of the Trans-Missouri Association fully adopts our definition. It nowhere intimates that any contract actually restraining trade could be taken out, or any one not actually restraining trade brought into, the guilty class by making the class an arbitrary one. On the contrary, in the few observations to which we have already alluded, made by the opinion in answer to the argument founded upon the allegations of the answer touching its intent, it states, in terms, that

the guilt or innocence of the agreement must depend upon its actual effect. It says: "The question is "one of law regarding the meaning and effect of the "agreement itself. Does the agreement restrain "trade or commerce in any way so as to be a viola- "tion of the act?"

FOURTH POINT.

There seems to be no room for doubt concerning the meaning of the term "in restraint of trade or commerce." To RESTRAIN is to HOLD BACK, to CHECK, to PREVENT, and thus to DIMINISH. It is INJURY to trade or commerce which the act is aimed to prevent. Unless, therefore, a contract INJURES and thus DIMINISHES, or tends to diminish, trade or commerce, it cannot be deemed as IN RESTRAINT of trade or commerce.

1. It can hardly be needful to enlarge upon this point. Commerce is everywhere in our law regarded as a public and national good. Anything which increases, extends and enlarges it is favored, and anything which injures and lessens it is discouraged, and may be prohibited.

The acts of individuals, separate or combined, may either aid, or injure, public interests. Where they aid, they are encouraged by the law, and where they injure, they may be repressed. It should be observed, however, that society relies far more upon the private acts of its members than upon its own corporate action for the promotion of useful public ends. Indeed it

is in general only where private action is inadequate that the power of law is invoked.

There is a multitude of forms in which persons in their private capacity combine together to prosecute, facilitate, increase and advance trade and commerce. The numerous exchanges and boards of trade are instances. Agreements and combinations of this nature *affect* trade and commerce in many forms; but unless they *injure* and *lessen* it, they cannot be said to *restrain* it.

FIFTH POINT.

The agreement under which the Joint Traffic Association was formed, and the carrying out of which is sought to be enjoined, is not a contract in restraint of trade or commerce within the meaning of the Act of July 2, 1890.

I. It does not *in terms* purport, or assume, to restrain or limit trade or commerce. No one of the parties to it undertakes in any manner to refrain from doing business. Indeed, it evidently assumes that all the parties to it are to continue to do all the business which their facilities enable them to do, and to strive against each other for a larger share of the business in every way except one.

It does, indeed, purport to restrain *competition*, although in a very slight degree, and on a single point. That is *one* of its objects; and if competition and commerce were *identical*, being but different names for the same thing, then, indeed, in assuming to restrain competition even so far, it would be assuming, in a corresponding degree, to restrain commerce, but surely no such identity will be pretended. Commerce

is the interchange of commodities. Competition is one of its *incidents* only, and but an occasional incident at that. It can and does take place on a large scale and in numerous forms without competition. To identify a thing with one of its occasional incidents would be an error too gross to call for any caution against making it.

II. This, however, is not enough to exclude the notion that a restraint upon competition must *necessarily* restrain commerce. It is *conceivable* that a restraint upon competition, although competition is but an occasional incident of commerce, must still necessarily restrain the latter; but, however conceivable, it is by no means true. The contrary is often true; namely, that such restraint enlarges, increases, and benefits it.

1. One of the common and immediate effects of competition undoubtedly is to lower the prices of the things as to which the competition arises, but to say that low prices are necessarily a benefit to commerce, or anything else, would be a wild assertion. On the contrary, declining prices are generally thought to be, and often are, in fact, the incidents and precursors of commercial and business depression, and rising prices, of prosperity. Low prices of things may benefit the buyers of them, but they correspondingly injure the producers and owners of them.

That competition is, in general, a good thing, that it is what is called "the life of trade," and that artificial efforts to repress it may have an injurious effect, opposed to a sound public policy is quite true; but to infer from this that it is so under all circumstances, or that it may not be productive of the most extensive

mischief, is a conclusion of ignorance, utterly refuted by the teachings of experience, and long since discarded by all enlightened minds.

2. But it is worth while to employ a few words in pointing what the true and great benefit of competition is, and when it ceases to be beneficial and becomes the source of mischief.

COMPETITION; ITS BENEFITS AND ITS EVILS.

Competition, when it takes place among the sellers of a particular thing, enables the buyers to obtain it at a lower price, and they gain at the expense of the sellers. No one will think this any more a good than if the conditions were reversed, and the buyers became the competing parties, in which case the sellers would obtain a better price and gain at the expense of the buyers.

It is sometimes, but erroneously, thought that competition makes prices low *all around* and that this is an advantage to *poor people*. In the first place it is not true that competition has any tendency to make low prices generally. Low prices are so by comparison only. Indeed there is no such thing as *low* or *high* prices generally. These can be predicated only of *particular* things. Such things may be said to be high or low in comparison with other things. To say that prices of everything (which, of course, would include money) were *high*, or *low*, would be insensible. If the prices of all things are equally diminished, by competition, or anything else, society and its members are left just as they were before. Nor is it true that low prices for commodities are necessarily good things for *poor people*, because they are *consumers*. The effect is rather the other way; for although they are consumers,

they are, at the same time, and to a somewhat greater extent, on the whole, *producers*.

To learn what the real beneficial results of competition are we must turn our attention to its effects upon the material interests of society *regarded as a whole*.

There is no class of persons in life whether engaged in labor, or in the business of employing it, or owning capital employed in industries, who do not, to a greater or less degree, engageo n the one hand, in competition, or who do not, on the other, feel the effects of competition in which they do not directly engage, and it would take a volume to trace and describe its entire influence. Nothing more can be done here than to illustrate its general effect, and, for this purpose, some instance should be taken where it is earnest and active and where, therefore, its effects may more readily be seen.

For this purpose we may take the manufacture of some description of goods for a *particular market*, open alike to all in proportion to their skill and pecuniary resources. The natural desire to gain as much as possible of the trade will induce underbidding, the practice of economies, the introduction of improved machinery, &c., until the least skilful, or those who possess the smallest resources, find that they are engaged in an unequal struggle, and will retire from the field by taking their capital, when they can disengage it, into some other branch of industry, where the competition is less fierce; and thus the rivals are reduced to a smaller number and would eventually be reduced to a single one, unless the competition should be arrested by some formal or tacit agreement. If the effect stopped here the results would be, on the whole, advantageous to society, for the rivals being stimulated to employ all their energies, the art would be perfected, the expense of production diminished to the benefit of consumers, and the workmen and capital employed would be in the receipt, the one, of reasonable wages, and the other, of a fair profit.

But the effects may not, and usually do not, stop at this point. The victors, in possession of the field, may by their superior advantages, machinery and skill be able, even at the reduced prices, to reap a profit greater than that earned in other industries. This offers a temptation to those engaged in such other industries to transfer their capital to the more profitable one, or, what is more easy, the *unemployed capital* derived from the harvested profits of other industries, of which there are always large amounts in busy communities embracing varied industries, is tempted to the more profitable industry, and the rivalry is thus reopened. If the victors in a field of industrial competition wish to secure undisturbed the fruits of their triumph, it behooves them to make a judicious use of it, and not to attempt, by raising prices, to increase profits over the average return upon invested capital. There can be no single proprietor, or combination of proprietors, except where the article cannot be produced indefinitely by the mere application of labor or capital, that is to say, except where there is a monopoly, either natural, or created by the state, so powerful as to defy competition. A short lived advantage may be secured, for even unemployed capital will not immediately respond to the temptation, and time is required to establish rival plants; but no man, or set of men, will be allowed to permanently reap a harvest in any considerable degree above the average. The risk in such cases by one who dares to challenge the prize, or a part of it, is not much. Men will not, indeed, venture their whole fortunes in such contests, but will be quite ready to risk a part of their surplus profits, and the facilities for aggregating a fund through corporate organizations are everywhere to be had.

Even if the victorious competitor had driven every rival from the field, and felt that no others would dare to enter it, he would not attempt to increase his profits by raising prices, for the reason that such an expe-

dient would not accomplish the end. The truth is now generally known that there is scarcely any commodity which is an absolute necessity, and, consequently, that the extent of the demand for anything is governed, largely, by the price. An increase of price, therefore, decreases the demand, and may do so to such an extent as to actually diminish the aggregate of profit, and, conversely, a decrease of price often has the effect of so largely increasing the demand as to result in increase of profit. Take the case of petroleum oil of the quality used in this country for light. Cheap as it is, it is yet beyond the means of the swarming millions of India, and none of it, or but very little, is sent thither; but a cheaper grade can be made which will withstand the danger of explosion, and yet furnish a much better light than is otherwise available for this class of people. Of course there is but an exceedingly small profit upon a gallon, but the mere circumstance that the price is so reduced as to be brought within the means of this enormous body of people creates a demand which supports a prodigious commerce of hundreds of millions of gallons annually.

These methods to which manufacturers on a large scale, who are supposed (although erroneously) to be beyond the reach of competition, resort, are really, themselves, competition on a grand scale. The refiners of oil for export to India are competing with the producers of other means of illumination there, and driving them from the market. It is the same with the producers in this country of electric lighting. They are competing with the manufacturers of gas, and compelling a reduction in the price of the latter.

What may be called the beneficial effects of competition are above displayed, and beneficial in a supreme degree they indeed are. They tend to secure two great results; *first*, the equalization of gains and advantages both to workmen and capitalists in all industries; *second*, the stimulation of every faculty of man to produce useful commodities at the least possible expense

and thus to increase the aggregate product and assign to each person engaged in the work a larger absolute share, and place a larger share of a useful thing within the reach of all. Any voluntary human conduct aimed to suppress or check the beneficent operation of this principle ought indeed to be disfavored by the law, and perhaps punished by severe penalties.

But there is a counterpart to this picture which reveals mischiefs and miseries flowing from the eager prosecution of competition which sometimes seem, for the moment at least, to equal, or outweigh, the benefits. The predominating motive in the rivalry being private and individual gain, no tenderness, or even thought, for the welfare of others is encouraged. Many are striving for the same thing, and every available weapon will be employed. Scruples are apt to be silenced, and "to get there" is a vulgar phrase which well describes the character of the struggle. In such a struggle the weakest goes first to the wall, but if the struggle is protracted all will go in their order until the field shows a single combatent only with no rival. The defeated, where they have any strength left, go into an inferior class to renew the same contest with less powerful antagonists, and the champion soon receives a challenge from other quarters which will put his powers to a severer test. This operation is constantly going on in the industrial world, and the law of the survival of the fittest seems to exercise everywhere its pitiless sway.

The crushing and destructive effect of this law is principally felt in those industries where the bulk of the capital is invested, not in the purchase of mere raw materials for manufacture, but in permanent physical structures. In these cases the capital cannot be disengaged. If that part of the demand which it once satisfied has been gained over by more successful rivals, there may be no longer any use for it and it may becomes worthless, and in effect lost. If the result of this loss is, on the whole, to enable the product to be fur-

nished to the public at a less rate, it is simply a case where the concentration of the industry in one, or a few, establishments has had the result of furnishing the public with a commodity at a less cost, and the loss, although a calamity to individuals, may be overcome by a corresponding public gain. If, however, the plant is one really needed by the community, and the only effect of its destruction is to induce the victorious rivals to subsequently raise the prices which they had previously lowered, the private loss is not counter-balanced by any public gain, and becomes a public, as well as private, calamity.

These observations show that there is a point beyond which competition may not only cease to be beneficial, but become exceedingly injurious, not only to private individuals, but to the public also. When prices have reached the point which places the profits of a particular industry on a level with the average profit of industries generally, the further prosecution of the struggle is likely to be injurious to the community, and the competition becomes destructive and deadly, precisely in proportion to the difficulty of disengaging the capital employed.

Those who, like the writer of this brief, prefer a society of which the characteristic feature is a large number of small, but independent, proprietors, look with regret upon the substitution in place of it of organized masses of human beings, who seem to be mere parts of a great industrial machine; but this means that they don't like a densely peopled world, and do not stop to think that we actually have one, and must adapt ourselves to its requirements. The opinion of Mr. Justice Peckham makes an allusion—perhaps mournful allusion—to the inconvenience and distress attendant upon modern changes in industry, and justly observes that they are probably unavoidable. But some of his observations seem, it is submitted, not entirely well founded. He says: "In business or "trading combinations they (the results of such com-

" binations) may even temporarily, or perhaps per-
" manently, reduce the price of the article traded in,
" or manufactured, by reducing the expense insepar-
" able from the running of many different companies
" for the same purpose. Trade or commerce under
" those circumstances may, nevertheless, be badly
" and unfortunately restrained by driving out of busi-
" ness the small dealers and worthy men whose lives
" have been spent therein, and who might not be able
" to readjust themselves to their altered surroundings.
" Mere reduction in the price of this commodity dealt
" in might be dearly paid for by the ruin of such a class,
" and the absorption of control over one commodity
" by an all-powerful combination of capital." But what is it that *drives* the small dealers out? If they are *driven* out, it is from being out-bid and under-sold; that is, they are driven out, not by a *restraint* upon competition, but by the *action* of competition. If it is desirable, on public grounds, to save them from ruin (and it may be) it can be done only by *arresting the competition*, and this can be effected only by an agreement fixing prices at a point which will enable them to live, or *buying them out*, which will save their capital, or part of it, which they may employ in fields where competition is less strenuous. The inevitable result is thus anticipated, and its harshness and misery taken away or diminished. The effect, in either case, cannot be called a restraint upon trade, for, it is admitted that trade in the article is increased. This is the necessary consequence of the diminution in price. The increased expense of numerous establishments, while they existed, was itself a restraint on the trade, which was done away with by the consolidation. Whether the enlargement of the trade gained at the loss of independent proprietors is, on the whole, a social benefit may be debated; but we should not forget that the real cause of the loss of the small independent proprietors is the *action* of *competition*, and not of those

agreements which simply soften and ameliorate its harsh and destructive features.

It is sometimes thought that the analagous competitive struggles among the brute orders of creation are even more destructive, but the fact is far otherwise. They may be more fierce and violent, but they have fixed limits. The brute cares only for the wants of his body, and when these are satisfied he lies down contented. An equitable division of the bounties of nature is thus effected among such a number as that provision will suffice to maintain. But the desires of man have no such limitations. However much he may acquire, he is still greedy for more, and is never absolutely satisfied. "*Nil actum reputans dum quid superesset agendum.*"

Is there, then, nothing which can set bounds upon this pursuit of material power and wealth and check its destructive tendencies while still preserving its beneficial effects? Something there must be, or the condition of the world would be much worse than we actually find it to be. This something is the fact that the greed of gain is, after all, not the supreme desire of man. *Happiness* is his "being's end and aim," and we are told that what is called the faculty of reason is bestowed upon him to enable him to better determine how, by checking some, and cultivating other, tendencies of his nature, he can reap the largest share of that.

The mode in which this faculty operates is sometimes by stimulating, but more often by *restraint*. If some only practice restraint, while others do not, the former surrender themselves as the mere victims of the latter. It is necessary that *all* should restrain themselves in the same manner, that is, in accordance with the same rules. It is for no other purpose than this that governments, in their just theory, exist.

But it is only a small part of the restraint which human society requires that governments undertake to impose, or are fitted to impose. Not to mention that

which proceeds from tacitly recognized customs, there are multitudes of voluntary organizations in the various departments of life which frame rules for the conduct of their members, and have ways more or less efficient for enforcing them. The restraining interference of government is, and should be, resorted to only when voluntary means fail, or are unsuitable for the purpose. They are, of course, unsuitable when the needed restraint is that required for the small and exceptional class which will not obey any rules except such as can be enforced by punishment, and hence we find that the interference of government is principally exhibited in the criminal law.

It is quite manifest that these restraints, from whatever source they proceed, whether from the voluntary organizations of individuals, or from the great all embracing organization which holds the sovereign power of the state, are essentially of the same character, and have the same objects in view; in other words, they are *modes of government*.

They are found nowhere more frequently than in the industrial pursuits of life, because it is there that they are most needed. It is there that the mercenary and individual desires and ambitions are most earnest and active, and where ungoverned action is likely to prove most injurious. They exist there to the greatest extent because the necessity for them is there most felt. No one would think of regarding them, in general, as injurious, because the necessity for them is manifest; and surely they would not be regarded as restraining trade, the very object of them being to promote trade. They are not aimed *against* anybody. They are simply *for* those who unite to form them, and yet are indirectly for the general benefit, for what benefits a part, without injuring others, benefits the whole.

An illustration may be introduced here. Take the case of the hack service at the railway stations in an ill-conditioned city. It happens, in the absence of

regulation, that great opportunities are offered for exacting excessive charges from passengers wishing that service, especially strangers. A crowd of rough and disreputable fellows with wretched conveyances, avail themselves of it, and the respectable drivers, who would greatly prefer to conduct their business with decency, are compelled to enter into competition with them, or abandon their business. Passengers, upon their arrival, are set upon by an ill-mannered crowd, outbidding each other in their pretences as to charges and conveniences, and such as take a conveyance find themselves, when set down, in dispute with half-ruffians as to the charge agreed upon. The consequence is that although many really wish the facility, few make use of it, except in case of sheer necessity, and the thought of every passenger is how he, or she, may best escape the rude annoyance sure to be met with on reaching the station. The business is effectually ruined. Where a dozen decent men might be employed usefully to themselves and others, a half dozen ruffians are engaged in plunder.

A proper municipal ordinance is passed and enforced under which the charges are fixed at a reasonable rate, and a passenger wishing the service is quietly shown to a decent vehicle. This of course is a *restraint*, and a restraint upon competition, but no one would think of it as a restraint upon *trade*. On the contrary it *creates* trade, and is indeed the necessary condition under which anything properly called trade in that branch of industry can exist. Now if this were not brought about by a municipal ordinance, the same thing might be attempted by a voluntary union of the honest and respectable drivers acting with a view to their own advantage. If an association were formed by them under which some superintendents in a recognized uniform should quietly conduct passengers wishing the convenience to some decent vehicle which would take them to the desired place with no apprehension of imposition or trouble

with the driver, the arrangement might be quite as effective as the ordinance, and even more so. No doubt there is *restraint*. All are bound by the rules of the association; but it is no more an agreement in restraint of trade, than the ordinance was a law in restraint of trade. Either would be equally in promotion of trade, and be correctly so styled.

An exception, however, is to be noted here. A few individuals of some trade or class, desiring to obtain an unequal and unfair advantage over others of the same class, or a whole class desirous of obtaining a similar advantage over the public, may unite together and take action for such purpose. An agreement for such a purpose would be of a very different character, and might be made a proper subject of legal prohibition.

Where there is already a large profit on some manufactured article, and the manufacturers combine in the form of trust or otherwise to fix prices, the unfair purpose is unmistakable. But where manufacturers are already engaged in a ruinous competition, and the profits afford no adequate return upon the capital, an agreement fixing prices is of a wholly different character and may be very useful not only to the parties, but to the public. Where the business is really *overdone*, as is often the case, *somebody must go out;* and competition will *drive out* the weaker parties with total ruin to them, unless the stronger anticipate and mitigate the inevitable result by joining together and *buying* them out. This is one of the beneficent modes by which the too pitiless action of competition is softened and ameliorated. These considerations confirm the correctness of the general statement that the competitions of men, whether in trade or elsewhere, must, in order even to preserve and promote the interests in which the competitions are exhibited, be restrained, sometimes preferably by law, sometimes preferably, by private agreement and organization.

Indeed, it may be said with entire truth that there

is no beneficent social force or social interest which does not require the guidance and restraint of *regulation* in order to promote and secure its own objects—a regulation sometimes effected by the voluntary action of men, and sometimes, where this does not suffice, by the compulsory power of law.

3. It may be thought that the above observations concerning the necessity of restraining competition are unnecessary, for the reason that the truth of them is so obvious that no one could be expected to call them in question. They would not have been introduced here except for the notion, quite common among those who have given little thought to the subject, that restraints upon competition, of whatever character or extent, are open to objection. The only conclusion now sought to be drawn is that a restraint upon competition does not, *of necessity*, restrain trade, but *may* even *promote* trade.

4. The true field of discussion in relation to this agreement is now disclosed. The material considerations turn upon the effects of *competition* upon the business of railroads, whether they are favorable, and how far favorable, to the commerce in which they are engaged, whether they are ever unfavorable and injurious to that commerce, and whether, and how, such injurious effects may properly be avoided. If the restraint on competition effected by this agreement is, necessarily, in the eye of the law, a bad thing in its effect upon trade, injuring and diminishing it, then, although, trade is not, *in terms*, restrained by it, it is so *in fact;* and if, on the other hand, it is, in the eye of the law, beneficial to trade, or cannot be seen to be injurious (for the burden of

establishing its injurious tendency is upon the plaintiffs), it must be held to be unaffected by the statute.

5. Considerations showing that the restraint was not only not injurious, but highly beneficial, were urged on the argument of the suit against the Trans-Missouri Association; but the Court, as the issue was there made up, could give no weight to them—could not even take them into account—for the reason that they were not unanimously agreed to. The Court was asked to read into the statute words not found there, and the ground of the request was that unless this were done, an intent would be imputed to Congress to condemn many beneficial agreements as crimes: but the answer of the Court was, in substance, and almost in language, that lawyers, judges and legislators were not *in unison* to the effect that the agreements referred to were beneficial, or not injurious; that there were widely divergent views upon the subject, some condemning them, while others favored them, and that it was impossible for the Court to say that Congress may not have entertained the view of those who condemned them.

But the question now is, *not* whether words not found in the statute should be *read into* it, but what the statute, as written, *includes*, and the burden of showing that this particular agreement is in restraint of trade or commerce, and so within the condemnation of the act and a crime in those who executed it is upon those who make the assertion.

III.—The agreement is question, as a whole, and, particularly, so much of it as affects competition, is in the highest degree *promotive* of trade and commerce.

1. The whole inquiry turns upon the actual nature, operation and effect of the agreement. These must be understood before any intelligent judgment can be pronounced. The necessity for a just and complete comprehension of this is the more plain from the circumstance that wide differences of judicial opinion have arisen concerning agreements bearing resemblances more or less near to the one under discussion—differences which, for the most part, are imputable for their origin, not to different views of purely legal doctrines, but different views as to the real facts to which such doctrines are to be applied.

2. The first step in ascertaining the nature, operation and effect of this agreement is to look closely into the actual state of facts which called it forth and to which it was to be applied; that is *to the actual business of the railway transportation affected by the agreement as it stood at the time the agreement was made*. And to this end a glance is needed at the historical development of this business, beginning with its origin.

The Origin, Development and Present Condition in this Country of the Business of Railway Transportation.

It would probably be true to say that upon the full institution of the system of private property, which is the foundation of our civilization and shapes its course at every step of its progress, wherever there was a human want for the supply of which men were willing to pay, it would be supplied in some way by the voluntary action of men—without the aid or interference of government. There are, however, some needs which, as has always been supposed, could be

best supplied by the direct agency of the state. These are very few in number, and, in general, limited to those which every individual requires to a greater or less degree, and to the furnishing of which every one should be compelled to contribute whether he wishes to do so or not. Among these universal needs, that of *ordinary highways on the land* is perhaps the most conspicuous and illustrative. They have generally been established and maintained by the public, and some recent developments connected with turnpike corporations have perhaps taught the lesson that they always should be.

When, however, the possibility and vast benefit of steam locomotives was revealed the question became a different one. The vehicles of carriage were seen to be practically inseparable from the highway, and whoever constructed and maintained this must undertake the work of operation, and thus engage in the business of a common carrier. It is useless now to discuss whether the State should have undertaken this whole work. It chose not to do so, and the reasons for this choice, if it were worth while to go into them, would, in the judgment of most minds, sufficiently defend it.

We have just observed that where there was an existing want for a supply of which men were willing to pay it would be supplied by private individuals: from which it would follow that simple abstinence by the public from building railroads would lead to the work being done by others. But there was an obstacle to this in the circumstances that the establishment of highways being habitually regarded as a public function, the expense of which might, whenever thought desirable, be reimbursed from tolls, the State would permit no competition for these with itself, and besides, an appropriation of land was necessary, which could be made only under the authority of the State. The building and operation of railroads being thus what is called a public franchise, private individuals could not engage in it without a grant from the public. This

appears to be the only point of difference between railroad business and other callings, so far as respects the operation of general industrial laws.

The State might have chosen to grant *exclusive* franchises for specified territories. This would have been to relieve its grantees from the influence of competition except such as would proceed from other methods of transportation, in other words to grant monopolies. Such a course would have been open to obvious, though perhaps not conclusive, objections. It would have been a *limiting of the supply* of a useful public facility for the benefit of a few. If the State determined that it would not itself engage in the business, some reasons of sound policy suggested that it should be thrown open to all.

This course was accordingly universally taken. Private individuals were invited to expend their own means in furnishing the facility by offering franchises to all who would take the hazard. The simple result was that the difference between railroad and other branches of business in great measure disappeared. The former stood, like other pursuits, fully on the basis of *free competition;* and the inexorable laws of free competition would control it; although operating indeed somewhat differently by reason of some peculiar conditions which such business presents.

These public offers were accepted whenever it was thought that a profit, present or future, was promised sufficient to justify the risk, and in this way the business began, and has been since prosecuted. It has, of course, been overdone as every business subjected to free competition is apt to be overdone. The sanguine expectations of men are seldom answered by results, and the consequence has been that the spectacle of roads built where there was not patronage sufficient to yield a return on the investment has been far more frequent than that of a failure to build where there was a sufficient patronage. Indeed, the latter condition is hardly known.

Many different causes have conspired to press forward the work. A single road connecting two considerable points immediately becomes a temptation to those just out of its reach, both laterally and at the terminals, to get to it, and extensions and branches immediately spring into existence. The people themselves want them for their business purposes, and construct them by forming new companies, or aid the existing companies to do it. Speculative promoters and contractors, in the hope of making a profit out of the job of construction, further stimulate extension. As the work has advanced it has been found that a little more construction would connect pre-existing lines, and promise a large through business. Systems begin to be formed, and then each system becomes anxious to secure the intervening territory by extending its arms in every direction. At the start the only competitors were other forms of land and water carriage. The former, consisting of teams and stages, were quickly and easily overcome. The latter, water carriage, was not greatly affected. Its natural advantages protected it. But as the roads began to multiply, competition followed between them, and as the existing business would be insufficient to support all, each would be driven for its existence, either to *create* new business, or further wrest from land carriers, or attempt a struggle against water transportation. Of course, success in none of these efforts could be had except by reduction in rates, or by the discovery and practice of economies.

If the above sketch of the progress of railway transportation in the United States, and of the causes which have shaped it be true, it must have followed as a consequence that the charges of transportation have been steadiiy diminishing. Should the fact be shown to be otherwise much doubt would justly be cast upon the correctness of the statement. But the fact is, notoriously, that such charges have

been constantly diminishing and they are now lower than in any country in the world; and it is probably true that the capital actually invested in them was, at the time of the passage of the anti-trust act, receiving a smaller annual return than capital invested in any other business, notwithstanding the risk to capital invested in railroads is far greater than that which attends many other investments.

If we were to look alone at the interest of that part of the public which requires and pays for the services of railroads the free competition above mentioned has been of great utility. They have obtained their commodity at a very low cost, much lower than anyone would, beforehand, have bargained to sell it. If we were to look at the interest of the *whole community*, it also has been benefited so far as free competition has prevented any reaping by railroads of profits larger than those made upon other ordinary investments; but outside of that, and so far as the fierce struggle has had the effect of making some investments valueless and reducing the entire income below the average rate, the whole community has suffered; and that part of it holding railroad investments has suffered most severely.

The reason why railroads are greater sufferers than other industries from the destructive effects of free competition is that the latter have several defences and protections against it while the former have but one. Manufacturers, for instance, of certain descriptions of goods, when there is a low price in consequence of an over supply, may hold their goods for another time and a better market, or, if the competition is so fierce that they feel unable to continue it, they may, at a sacrifice indeed, sell out and transfer their capital to some other quarter. This they can generally do, for their buildings and water or steam power have a value for many other purposes, and some other men with better advantages may think they can continue the business successfully; or they may come to an agreement with their com-

petitors to stop the warfare. This is possible only when all have come to the conclusion that they can no longer benefit themselves by a further struggle.

Of these defences the first is not open to a railroad. It cannot hold its goods for a better market. The provision for a certain amount of transportation has already been made and the expense fully incurred. All that is received is clear gain; that is to say, it will make the loss so much less, even if it fails to make a profit. Nor is the second any more open. The railroad owner cannot find any purchaser for his plant who may profitably employ it for some other purpose. It can be used only as a railroad.

The only resort open to railroads to save themselves from the effects of a ruinous competition is the third method, that of agreement among themselves to check and control it.

The importance of this consideration, and the circumstance that it is not generally fully comprehended and acknowledged is a sufficient reason for drawing the closest attention to it. In dealings in *physical commodities*(we mean those which can be produced to an unlimited extent, by the mere application of labor and capital) there is no *compulsion* either to sell or to buy. Purchasers and sellers are both *free*. If the purchaser is not satisfied with the price, he can withhold his stock for a better market, and he ordinarily does stop before he reaches the cost of the article. If the better market does not come, he may think it expedient to offer for cost, or even less than cost, but in the case of most commodities a moderate abatement of the price enables him to sell, for it must be remembered that there is competition here on both sides. If a good price is offered sellers compete to get it, if the sellers offer at a low price buyers rush to get the goods. *Market prices* are thus established which do not in general range through wide distances, and the loss of sellers, where they make one, is thus moderated. If for any reason the market remains low, they dimin-

ish production until it falls below the demand, when the competition is shifted to the other side and prices rise. The whole world is a possible buyer and a possible seller. The demand at certain prices is unlimited, and the manufactures of the United States would, if the prices were made to suit, go to the ends of the earth. Under these conditions, buyers and sellers being equally free, a certain degree of stability is *automatically* brought about, and though some may, in some years, make a loss, few are ruined. *Transportation by water*, at least ocean transportation, is subject to the same laws. Shippers and carriers are equally free. The shipping of the whole world may resort to every port. If freights at any particular port are high, vessels will flock thither; if low, they will seek other shores. Neither side will make an engagement except on terms which will promise a profit, except that sometimes a ship will take a cargo at a very low rate, or even go in ballast, in order to get to a better market.

The conditions in railway transportation are widely different. The *shippers* are for the most part free, and may withhold their goods for lower rates, but the *carriers* are not free. They are under a compulsion to sell their transportation day by day, or submit to a total loss of it. Whatever they get, and however much smaller than the expense of doing the business, is still so much gained which would otherwise be lost. Nor can they, like the manufacturers of commodities, curtail their production. They must go on producing, however unable to re-imburse themselves. Neither can they, by a small diminution of price, enlarge the demand, at least, immediately. The world is not open to them. The goods of Europe will not flow here for the fun of being carried. There is a certain amount of business to be done by all, and the struggle of each is to get as much as possible of that.

Under these circumstances it is too plain for argument that prices can never rise to any considerable

height above the living point. No combination would be able to effect that, for if the profits of carriage were very high the temptation to secure a larger share without being detected would triumph over the prudential fear of bringing on a destructive combination. It is equally certain that a ruinous competition must come unless avoided by faithfully kept agreement. It is in the last degree difficult to avoid it even by this means, but the certainty of ruin unless such a course is taken is a powerful incentive to good faith.

In describing as above the features of railroad competition we have sought to give its salient and controlling features. There are, indeed, important qualifications at all times operating which check the ruinous tendencies. To a limited extent, and with certain commodities, chiefly the great staples, a slight decrease in rates will draw out traffic awaiting transportation and enable cars to be filled, and a rise in the great centres of exportation of the price of such commodities, will sometimes furnish a volume of traffic greater than the combined facilities for moving it. And, besides this, the natural dread of doing business at less than cost is always strongly operative. But these are plainly insufficient to prevent one railroad from meeting any reduction of rates offered by a rival. The compulsion is absolute and can never be resisted.

These views do not depend on any abstract reasoning as to the nature of competition operating upon such conditions, although this would be enough to establish them, but they are confirmed by the unvarying results of actual experience. The history of railroad transportation proves that whenever a railroad depends for its support upon traffic upon which another railroad is in like manner dependent, and the competition thus engendered has continued for any considerable length of time, one competitor has either swallowed up the other, or, if both survive, it is under some *modus vivendi* established by agreement.

A reference to the present condition of railway transportation in England well illustrates and proves this. There the traffic furnished by a small territory is so large that many independent rival lines have grown up to satisfy the demand. They are in earnest competition with each other, and it is prosecuted by efforts to attract the traffic towards each, by the offering of superior facilities. But these rival lines have cost vast sums, have become firmly established, and pay regular and fair dividends. Any competition in *rates* would soon become war and imperil vast interests. The managers are so conscious of this danger that they do not *dare* to enter into any *such* competition, and by *conference* and *tacit agreement* the rates are fixed. The fear of the inevitable consequences of a struggle in rates is sufficient to secure an obedience to these tacit understandings. A very intelligent observer of the English system, Mr. Robert P. Porter, in a recently published letter (Boston Transcript, Oct. 4th, 1897), says:

"The general manager of one of the great English "railways said to me when in London the other "day: 'There is not much "pooling" or dividing "'traffic receipts now in England. Our own com- "'pany still maintains a few pooling arrangements, "'but they are not important.' The fact is, the "English railways have arrived at much the same re- "sults by an arrangement, or agreement, as to rates "and fares to be charged by competitive companies "running to the same points from the same termini. "Under these agreements, which appear to be abso- "lutely kept as to passenger traffic, the whole regular "traffic of the United Kingdom is practically pooled. "For example, there are four great railways compet- "ing for the traffic between London and Liverpool— "the London and Northwestern, the Midland, the "Great Northern and the Great Western. The Lon- "don and Northwestern is the shortest and most di-

"rect way, and, therefore, the fare is based on that "route. Between it and the Great Western there is "a difference of some forty miles, yet the fares on all "four roads are identically the same. A regular pool "once existed between these roads for the Liverpool "traffic, but when it had expired matters had ad- "justed themselves in a manner satisfactory to each "company, and the compact or agreement has been "substantially kept without the form of a pool. Of "course, if any of these four railways began to cut "rates, they would be met by the other companies, "until all had enough of such folly, and entered into "an actual agreement again. This, it should be re- "membered, they have a perfect legal right to do. "Thus we have here, and there are hundreds of similar "instances in England, a tacit agreement as to com- "petitive rates, namely, that each company shall se- "cure, by legitimate means, all the through traffic it "can, the rates of fare being similar at all competi- "tive points. Again, the distance between London "and Birmingham is 113 miles by the Northwestern "and $129\frac{1}{2}$ miles by the Great Western, yet both "charge the same and do the journey in the same "time. Meantime, the Great Western will soon open "a shorter route, which may lead to a reduction of "time, but certainly not to a reduction of fare."

From this survey of the action of competition in which it is, at one time, perceived to be the source of great benefits and, at others, of great mischiefs, it ought to be possible to discern the conditions under which it is beneficial and those under which it ceases to be such. If this could be done a long step would be taken towards the solution of the problem we have before us. We have already seen that the contestants in a competitive struggle may put an end to the strife by agreement, but also that it is possible that they may combine together by agreement, not to save themselves from ruin, but to make exactions from the public.

The desirable thing is to know when and under what circumstances a resort is beneficial as having the effect of preventing destructive strife without imposing undue exactions upon the public.

One answer may be promptly given to this question, although it may not be wholly satisfactory, that is, *whenever it is necessary;* and if it is asked, necessary to *what?* the answer is, necessary *in order to save useful life*, and it is not difficult to determine when such an exigency exists. If many are engaged as rivals in the production of the same article, the one having the fewest advantages will soon perceive that he cannot long carry on the struggle, and will retire and employ his capital and his energies in another field; and this is best both for him and the public, for the remaining contestants can easily and more cheaply supply the present demand. As the contest proceeds the next weakest will in like manner retire, and with the like advantage and the establishments and investments of the remaining rivals will be proportionately increased in order to make up for the losses in the sources of supply thus cut off. But the alternative of retiring becomes more and more difficult. The establishments soon become so large that a transfer of capital is impossible without heavy loss. Other expedients are resorted to, such as a temporary suspension of production; but this becomes more and more difficult, and the rival, or rivals, continuing in business keep the market fully supplied and the weaker party finds itself reduced to the alternatives either of sustaining a ruinous loss by a forced sale, or engaging in a last desperate attempt to overcome his remaining rivals. Under these circumstances he seeks a conference with his rivals, and is ready to put an end to the destructive competition either by an agreement not to sell below certain prices, or to sell out his establishment to them at a fair price, or to consolidate all together under a common ownership. Surely there is no public reason why either of these things should not

be permitted, and, so far as the public is concerned, it is indifferent which course is taken. If the contest should be continued bankruptcy would soon overtake the weakest of the competitors, and his establishment would find its only purchaser in one of the others. The inevitable end is the same whichever course is pursued; but if it is anticipated in either of the ways indicated, the weaker party and his creditors are saved from ruin. The trade was sufficient to fairly employ all the capital invested, and the bankruptcy and ruin of one of the parties, carrying down many others with him, would be a public misfortune. The consolidation of the business, although it removes immediate and direct competition, does not escape that which is indirect. If advantage were taken of the absence of rivalry to put up prices, it would either so check the demand as to disappoint the hope of increased profit, or, if increased profits were realized, other rivals pressed with competition in their own pursuits would come in to partake of them. What would be said to the suggestion of a *law* which should *compel* these last contestants in a fierce struggle for existence to continue the fight until there was but a single survivor, by denying the privilege of agreement in either of the above mentioned forms? And yet this is, in substance and effect, what the Anti-Trust Act is asserted by the appellants to be.

Voluntary and Involuntary Competition.

It will be observed that in the illustrations above given the competition is in every stage *voluntary*, and, so long as it is voluntary, it operates *automatically* to shut out from every industry any excess of capital invested in it, which would operate to reduce the returns below the general average, and to transfer capital to those fields where the profits are in excess of the average.

It may be asked why, if this operation thus proceeds automatically, all production does not fall into the hands of a few large proprietors. Such, indeed, is the tendency, and such would be the effect, except for the circumstance of the infinite variety in the articles of production, and in the unequal natural advantages of producers. Locality of demand, adaptedness of machinery, different degrees of skill in management, accessibility of materials—all of these furnish special advantages which enable small producers to carry on a limited trade, and release them from the pressure of the great rivals whose power is derived from the devotion of vast capital and skill to the production of a single thing. Where there is an enormous demand for the *same thing*, such for instance as sugar, it is nearly certain that the production will fall into a very few hands, or a single corporate hand.

Let us turn from instances of *voluntary* competition to those where it assumes a compulsory form, and of which the principal instance is that of railway transportation. Let it be supposed that several lines are competing for the same traffic. One may be decidedly weaker than the others and unable to engage in sharp competition. Its owners would like to retire from the field, and generally do so by effecting sales of their stock at reduced prices; but changing owners does not remove the problem. The new owners find their purchase anything but a prize. The capital cannot be transferred to a new employment. The investment can be used for a railroad alone. Nor can they stop producing while the business is unprofitable and save expenses until the season when the rivals have more than they can carry. The law obliges them to continue to produce their goods though they are unable to effect sales. They must go on until absolute inability to pay expenses compels the surrender of their worthless investment.

If it is the case of a road in excess of the public requirements, there is nothing to be regretted. The

building of it was a mistake, and it will bring nothing at the sale except the value of its materials. If, on the other hand, it is one really needed, and at times essential, a price will be paid for it by one of the rivals who may operate it with less expense in connection with its own line, and with a profit. But suppose the case of several rival lines, all of them much needed public facilities, and to support all of which there is a sufficient traffic at fair rates. The competition between them waxes fiercer and fiercer until the point is reached where there is no profit for the road possessing the least natural advantages. Can a word be said in defence of the proposition that public policy *requires* that this competition should proceed until it ends in the successive destruction of the weaker parties and the consequent loss of the most useful public facilities?

From this we venture to draw the conclusion that *competition is beneficial only where it is voluntary*. Such a thing as competition made compulsory *by law* is utterly abhorrent to every principle of public policy. What inducement would there be to industry if its fruits were commanded to be placed at the peril of a struggle, which, once begun, must continue until but one survivor is left? If individuals are not allowed to put an end by agreement to the strifes of competition, the law itself should do it by appointing to each his field of labor and fixing the reward he is to receive. Such a system would have at least some foundation in reason. It is what many men dream of under the name of socialism.

In all the ordinary industries competition is, of necessity, *voluntary*, inasmuch as the competitors are legally free to retire whenever they choose, though sometimes only at a loss which amounts to a public misfortune. Whether, in order to avoid such loss, the rivals may, in any and every case, put an end to the contest by agreement, is a question upon which the authorities may permit some debate, though there

is little room for any in reason; but, certainly, when the law itself does not permit a retirement from the business, it must permit the termination of strife by agreement. Otherwise, it would sanction a *compulsory competition*.

Those who look with disfavor upon such checks upon competition, generally base their views upon the notion that they are restraints upon the *natural* course of trade, and that it is necessary, or, at least, highly desirable, that what is called the *order of nature* should not be interfered with. What they understand by the *order of nature* is not very clear, but a just definition certainly would be that order which would follow, if men were left free to act as they chose, subject of course to the rules of morality, without interference by positive law. But the making of agreements for the conduct of business is as much in the order of nature as anything else. Wherever men encounter a difficulty or mischief which can be done away with only by mutual agreement, can anything be more natural than that they should make agreements for such purposes? They do it in a thousand cases to which there has never been a thought of objection, and why they should not do it in the one with which we are dealing, if good can thereby be accomplished, is not to be perceived. It is not the *prohibition*, but the *permission* of agreements which the argument from the *order of nature* supports.

It is not, however, our argument that men should be permitted under *all* circumstances to make such agreements as they please. We take only the moderate ground always sanctioned by the wisest judges, that *freedom of contract* is, *in general*, the best public policy. Some men will always be found who will abuse freedom, and make contracts of a mischievous public tendency. These should be declared illegal, and may justify penal enactments. The courts have a broad jurisdiction to inquire into and determine what

contracts are and what are not in conflict, with public policy.

It may be asked why the natural tendency of unrestrained competition in railway business to drive out the weaker rivals and bring about consolidated ownership has not had that actual effect. It has had that actual effect, and has, from the first, been operating to produce it. So far as such effect has not been fully produced, it has been owing to the operation of two restraining causes which themselves confirm the general statement.

The first is the fact that owing to geographical separation, and difference of relation to different markets, some roads have advantages which others cannot, at present, enjoy. But this is only to say that they are, *so far*, removed from the stress of competition; that is, that competition does not exist. The other is that two great and powerful adversaries, unable for any cause to enter into formal agreements, will from the mere sense of necessity, to a certain extent, *tacitly* adopt similar rates, and refrain, like two hostile nations, armed against each other, but dreading actual collision, from any course likely to plunge them into actual strife. But this, whatever it may be in appearance, is, in reality, agreement, and is as obnoxious to the spirit and policy of the law as the most formal agreement, if the latter is thus obnoxious.

But the effects of these two retarding influences are limited. In the progress of competition local lines are continually falling under the ownership and control of the large systems, and are thus brought within the range of the competitions in which the latter are engaged, and the same extensions and consolidations result in bringing water and railway transportation into rivalry, even when the lines are widely separated.

We do not mean to be understood as implying, or intimating, that the process of consolidation has been at all times the result of competition proceeding to the last extremity. Much of it has taken place from

a wholly different cause, namely, obvious convenience. A vast amount of the consolidation has consisted of purchases by main lines of branch and connecting lines. Between these, competition is not operative; but it has been found to be in the interest of the owners, as it is obviously in the public interest, that all the roads which serve to feed the traffic of a main line should be controlled by it, and the facilities of legislation have been amply extended to allow purchases and other forms of consolidation. The effects of competition to compel consolidation are, of course, felt only where the competition exists.

The extinction of competition by agreement has always been going on in the industrial world, and to the two principal ways in which it is done no sound lawyers, or thinkers, have ever suggested any objection. The first method is by forming co-partnerships. Nothing is more common than the union of rivals engaged in the same business under co-partnership forms, with no other purpose than that of putting an end to competition. But in cases where this cannot be well accomplished, owing to the number of the rivals and the magnitude of the investments, corporate organizations are resorted to. In what substantial respect do these differ from co-partnerships? What is the great American Sugar Refining Company but a union of the principal sugar refiners of the country to consolidate their business and extinguish competition among themselves? The State may refuse them the aid of corporate organization for such a purpose; but it should not, and, indeed, could not, constitutionally deny them the right to do the same things by co-partnership.

We have thus far described the necessary results which have flowed from the great leading fact that from the beginning railroad transportation has, by the deliberate choice of government, been committed to private enterprise acting under the stress of free competition, and thus converted from a public to a private

business. That it has been a prodigious stimulus to extension, cannot be doubted. Fair business enterprise, over-sanguine expectations, speculation, both honest and dishonest, have all been called into play, and the whole country has been traversed in every direction by a network of railroads, furnishing a public accommodation which certainly would not have been approached in extent had the states reserved the business to their own direct prosecution.

We have next to consider the *quality* of the service and the causes which have operated to bestow upon it whatever merit or other character it may possess, and how that has been, and is, affected by sharp competition.

The six main requisites of railway service and how they are affected by illegitimate competition.

An ideally perfect railroad service would be one in which a shipper was assured that he could deliver any amount, large or small, of merchandise at any point in the country at any time, present, or within any future time for which he is in the habit of making his business arrangements, destined for any other point, and have it delivered at its destination in safety and with dispatch, at a price, known beforehand, which would fairly reward the service and be no greater or less than that exacted from others in similar circumstances.

This would include the following requisites? (1) *Uniformity in rates.* (2) *Stability in rates.* (3) *Equality in rates.* (4) *Despatch and safety.* (5) *Ease and convenience*, effected by classification and publicity. (6) *Reasonable rates.*

That these are the main requirements is so immediately obvious that no words are needed to show it.

Among them we place *uniformity in rates* first, because it is preeminently entitled to that place. All the other requisites depend upon it largely, and some of them absolutely. It presents itself in two aspects: *First*, uniformity in the rates charged *by the same road* for services, which, though different in some respects, as being hauls of different kinds of goods, or on different parts of the line, are yet substantially the same service *in amount*. This sort of uniformity is enjoined by the Inter-State Commerce law, and is an object which may be gained by law. It is not this uniformity of which we now more particularly speak; but we mean uniformity of charge *by different and competing roads* for like hauls of like goods. We mean that it is an essential requisite, that while competition in the *quality of the service* should be active, yet that competition in rates should, *by some means or other*, be done away with, as being intrinsically the source of unendurable evils. No one of the other requisites is possible unless this is assured. Competition is simply the *negative* both of stability and equality. Change and inequality are its direct and inevitable consequences. Every transaction of any considerable amount becomes the subject of a special bargain, in which skill, dexterity, deceit and every form of unscrupulousness are brought into play. Large shippers seek from freight agents the lowest rates they can get. They represent that they can have certain very low rates from some rival line. The representation may be true or false. The railroad agent feels that he cannot afford to lose the traffic and offers a lower rate. The ignorant, truthful or unskilled shipper is at a great disadvantage, and pays a higher rate. For instance, a nominally regular rate is charged for carrying passengers. The ordinary passenger wishing to go from New York to Chicago, ignorant of the devices which may be resorted to, blindly pays the nominally regular fare of twenty dollars. A shrewder one having his family or companions, enabling him to make

up a group, offers fourteen dollars for ten tickets and the agent desirous of securing the large sum of $140, accepts the offer. Middlemen spring up and procure tickets in quantity and undersell the regular agents of the company. The principal instrumentality employed by the competing parties is soliciting agents, who besiege merchants, manufacturers and others controlling shipments. They become valuable in proportion to their success without much regard to the means they employ. Their own understanding of their duties — probably not very erroneous — is that they are to "get there." Of course nothing can be wanting to bring about perfect demoralization after such agencies are resorted to. The result is that there is absolutely nothing which can be called a rate, either for freight or passengers, and there is no remedy for it except consolidated control. Such a thing as different charges for the carriage of the same goods to or from the same market is a monstrosity which would make the business of life impossible. It nowhere exists, except in this country, and only here occasionally, as a consequence of a failure to keep agreements. In England it is prevented by pooling or by tacit agreement. On the continent the necessity of uniformity has forced the railroads of the principal nations and the nations themselves by a vastly extended combination, formed by agreements and supplemented by treaties, to do away with competition *in rates*.

The fourth requirement, that of *despatch* and *safety*, is also, though not entirely defeated, greatly obstructed and impaired by competition when it becomes intense and deadly. The course of traffic becomes irregular. The shipping public, finding rates greatly reduced, and not knowing how long they will remain so, presses its business upon the roads supposed, for the moment, to offer the lowest rates. Trains are multiplied and lengthened. The personal force of the roads is taxed for a time beyond its ability. The

occasions for delays and the opportunities for danger are multiplied; and, in addition, the diminished profits lead to a neglect of the tracks, bridges and equipment which will inevitably manifest itself in an increase of accidents. But nothing more than the suggestion is needed to show that disturbance and irregularity in traffic, bringing the unexpected along with it at every turn, is wholly inconsistent with despatch and safety.

The fifth requirement, that of *ease* and *convenience* in shipping is similarly obstructed by sharp competition. The instrumentalities upon the effectiveness of which it principally depends are facilities for the interchange of traffic and the classification of freight. Both these, from the nature of the case, are dependent, at every step, upon agreement. In the simple case of two connecting lines, neither of which is subjected to competition, if we may suppose a case which rarely if ever exists, there is, indeed, no obstacle to complete harmony; but where there are two rivals, each connecting at their terminals with another and the same road, there is an ever present inducement for one of the rivals to combine with the connecting road to secure secret advantages over its competitor. The Inter-state Commerce Act condemns, indeed, the extension of such advantages; but its requirements are apt to go for but little under the pressure of intense competition. If one competitor can throw obstacles in the way of another, it will, and there is no method which will be found effective for the removal of unfair and illegal preferences except that of removing the competition which is its cause.

The same is true of classification. The business of classification, as it stands between competing roads, should be fully understood. Without such understanding there can be no just comprehension of the questions involved in this action. Precision and some detail are therefore essential and will be excused.

We must begin with an accurate *definition* of the

thing itself. A classification of freight is the assignment of all the subjects of transportation, say thirty thousand, to a small number of classes varying in number in different areas where the conditions of transportation differ, with a view of assigning, in each district, a given rate to each class; such arrangement being not according to bulk, weight, value, risk, labor of handling, or any other single element of carriage, but made upon consideration of, and as a compromise between, these and other elements. This compels the carriage of many articles at less than cost, the loss being made up by the profit on other articles.

Classification, therefore, is only an incident of *rate making*. Its sole purpose is to enable shippers on the one hand and railroad managers on the other to know by a glance at the rate sheet what is to be charged for the carriage of particular goods. If nothing were charged, if all goods were carried at the public expense, there would be no occasion for a classification and there would be none.

And a strict observance, both of the classification and of the rates assigned to each class, is absolutely essential. If the classes should be disregarded or changed at pleasure, and goods in one class charged a rate different from the one assigned to the class, or particular articles taken at pleasure out of one class and put into another, the classification would be an empty and meaningless form, and so utterly useless that it would not be resorted to.

Classification, as thus explained, is so great a convenience, both to the public and the managers of railroad business, that if there were no such thing as competition, that is to say, if all roads were owned and operated by government, or by a single corporation, a resort to it would be necessary. The enormous labor and inconvenience of having a particular rate for each one of thirty thousand different subjects of transportation would compel it

The *presence* of competition *in rates* immediately renders classification, not indeed theoretically impossible, but absolutely useless, and so useless that it would never be, under that condition, resorted to. The two things are utterly hostile to each other, and can never co-exist. This should be clearly understood. Inasmuch as classification is simply a *part* of rate making, it never is and never has been attempted, except upon the assumption that when it is established it will be observed; and this means that the parties to it will charge the rates, and only the rates, fixed by it; and they are fixed only by a designation of the rate to be charged upon each class. Any notion that railroad managers ever did, or could, or that it would be of the slightest use or significance if they could, separate the various subjects of transportation into a small number of classes without fixing rates for each class, would be an utter illusion. But let us be sure of this, and take nothing for granted. In all competition the supreme object, which dominates all others, is *to get business;* and to this end the rates must be accommodated to the necessity. The soliciting agents of a road are instructed to secure it, either on any terms, or within certain named limits. They apply to a shipper of wheat and find that they can obtain a lot of 500,000 bushels from Chicago to New York at a certain rate and not otherwise, and they have reason to know, or think they have reason to know, that unless they take it at that rate, some other road will. It is lower than the published rate, lower also than the classified rate; but it is taken notwithstanding, because, otherwise, it is believed the business will be lost. The whole transaction is *secret*, and care may, or may not, be taken to exhibit a formal compliance with the law by charging, nominally, a rate equal to the published one, and agreeing for a *rebate*. It will be perceived that in order to gain the object, an article in one class will be placed in another class, or taken at some lower

rate than that of the class to which it belongs, as may be most convenient, that is to say, that the classification amounts to nothing. Under such circumstances, of course, no efforts will be made to bring about a classification, which all parties understand will be an empty form.

Classification, therefore, and *agreement on rates* are parts of the *same thing*, and necessarily imply each other. When agreement on rates is impossible, classification is impossible. When the representatives of railroad companies go into conference with a view to effecting classification, they do not say to each other, "Let us classify articles of transportation, without making rates, with a view to convenience and then compete, if we choose, on the rates at which we will carry the articles, and all the articles, in each class respectively." They know perfectly well that if competition in rates is left free to act it cannot be subjected to such, or any limits, and they would smile at a proposal to classify without agreeing on rates. All the classification ever known between competing railroads has been instituted by an attempt to agree upon rates, and, so far as effected, has consisted in an agreement on rates.

Uniformity in rates, therefore, is an essential condition of classification, and as *somebody must* classify, and none can classify except those who have the power to determine rates, the work must be done by the owners and operators of railroads, who alone have the power. Everywhere in the world this work has, so far, been done by them. We cite from what appears to be a credible authority a passage which shows that the constitution of the Prussian kingdom makes it one of the duties of the government to strive for the attainment of uniform railroad rates, and shows also how that uniformity is brought about without imposing government rates upon the railroad companies under private ownership.

"The federal constitution makes it the duty of the

" government to cause the German railroads to be " managed as a uniform network in the interests of " the general traffic. This phrase, 'as a uniform " network,' is an elastic one, and probably would " suffice to give the federal government most of the " powers it exercises; yet, nine articles of the con- " stitution are either wholly or in part devoted to the " subject of railroads, embracing matters pertaining " to construction, equipment, operation and repair. " These articles declare that the government shall " strive to induce a uniform system of regulations for " the operation of all German railroads, and a uniform " system of rates; that it shall strive to secure the " greatest possible reduction of rates, especially for " long hauls of articles supplying the wants of agri- " culture and of industry, such as coal, coke, wood, " ore, stone, salt, pig-iron, fertilizers, etc. In times " of distress and famine, the emperor, on the recom- " mendation of the railroad committee of the " Bundesrath, a standing committee required by the " federal constitution, may temporarily fix rates for " the transportation of the necessaries of life, pro- " vided that such a reduction shall not reduce rates " below those charged on the respective railroads for " the transportation of raw material. These constitu- " tional provisions have been well carried out, for the " German railroads *are* operated as a system, and " their system of rates and of regulations has develop- " ed a high degree of uniformity. The emperor has " not yet been called upon to exercise his special pre- " rogative during times of distress because the rail- " roads have voluntarily met the needs of such " times." (Annals of the American Academy of Political and Social Science for November, 1897, p. 81.)

The same Article from which the foregoing extract is taken also shows that all the great lines in a large part of Europe carrying international traffic are united for the same purpose by Associations among them-

selves, supplemented by treaties between the nations.

The last requirement, that of a reasonable reward, must of necessity be sacrificed by the loss of uniformity. The price will either be too high, or too low to furnish an adequate return on the capital.

THE DEVELOPMENT AND PROGRESS OF CO-OPERATION, AGREEMENT, AND TRAFFIC ASSOCIATIONS IN OUR RAILROAD SYSTEM.

It is an assured fact that wherever men are engaged in performing different parts of the same work they will *co-operate* in it, that is they will *agree* with each other, to the end that the work of each may be as little troublesome, and as effective as possible. Self-interest and benevolence here concur with each other; and it may with equal confidence be said that men will always under these circumstances agree, unless they are somehow prevented.

Accordingly, in the first stage of railroad transportations the railroads would co-operate with teams and stages by entering into mutual and joint arrangements, and when branches and extensions were constructed by independent companies, similar arrangements would be entered into with them. Of course no *through* passenger ticket could be sold, or *through* shipment of freight be made, without such agreement; and such a prodigious saving of expense and trouble, not only to passengers and shippers, but also to the carriers themselves, could be thus effected, that, as a matter of course, agreement would, and did, go, hand in hand, with railroad extension. This sort of agreement is that which subsists between *connecting* companies and it is universal, embracing every railroad, and many lines of water carriage, and covers a great variety of points, such as the establishment and division of joint rates, the furnishing of facilities for the trans-shipment and inter-change of traffic, the common use of each

other's tracks, stations, etc. Inasmuch as competition, the great obstacle to agreement, does not here exist, there is nothing to interfere with the complete extension of this form of co-operation.

When, however, competitive lines first sprang into existence other considerations came into play. It is presumable that they were not often, if ever, built in reliance upon competitive business alone, or chiefly. While competing, they would, at the same time, be drawing out new traffic from new territory, and the expectation would be that such new traffic, added to that which was the subject of competition, would afford patronage sufficient to sustain both lines. But expectations are apt to be over-sanguine, and it would generally be found that the profits of the original line were reduced below the point of satisfaction to the proprietors. The latter might seek to restore its fortunes by building new branches, or extensions, and thus calling out additional patronage. It must do this, or enter into a perilous conflict with its rival. The natural indisposition to take this dangerous step would suggest an effort for an agreement or understanding as to competitive rates. Probably no two railroads ever came into competition without an effort, at least, to come to an understanding upon competitive charges. Self interest, the universal guide, will always counsel the endeavor, unless one of the parties is convinced that he can easily overcome his competitor. The difficulty is in keeping the agreement. If self interest suggests a departure, the sense of honor will be found regretably weak. This would be so, even between two private individuals acting only for themselves. It is much more so when men are managing the interests of others, as well as their own. They have then to encounter, not only personal loss, but the complaints of their principals. The expectation that a departure from the agreement may not be discovered, the abundance of pretexts which may be urged in excuse or palliation, and

the inability to enforce the agreement, all combine to weaken it. If, under the agreement, one of the parties finds that he cannot even live, it will surely be broken. No man will deliberately lay down and die, because he has made an executory agreement which calls for death. If the sense of honor is weak, as unfortunately it often is, the agreement will be broken even to gain advantages.

Every breach of such agreements, of course, involves a renewal of war. Such breach means that the violating party will not keep the peace, and the other is obliged to accept war whether he wishes it or not. It now becomes war to the death, and by every means known to war, and, of course, with the necessary accompaniment of demoralization to the whole business, as detrimental to public interests as to those of the contending parties, and involving even the raising of the passions. But war, from the nature of the case, cannot be perpetual. It must, at some time, end, either in the bankruptcy and consequent paralysis of one of the belligerents, in which case his road passes into the control of the conqueror, or in a new agreement in more solemn form, and with new and, presumably, better, guaranties. It must now be the care of the victor even to secure a living to his victim, for he knows that any agreement which failed in this would be wholly abortive. It has become a maxim among railroad operators that no other agreements will be effectual for any purpose. The first thing is to make concessions which will enable the weaker party to secure traffic enough to live. If this cannot be done without diminishing too much the profits of the stronger, then the weaker must die.

In obedience to the causes and influences above mentioned, agreements, kept with varying degrees of fidelity, or rather broken in varying degrees of frequency, have gone hand in hand with competition from the moment when competition appeared. This has been the observed fact; and it is the necessary

fact. As competition has extended, agreements, designed to prevent its ruinous consequences, and resulting either in the surrender, for a price, of the weaker to the stronger competitors, or in concessions for prolonging the life of the former, have also been extended. The breach of them has been followed by demoralizing wars as damaging to public interests as to those of the contending parties; and the wars have terminated, as war always does, either in surrender, or in new agreements. The scope of the agreements has widened with the widening of competition, until they have come to embrace the traffic of great trunk lines controlling the transportation of great tracts of territory. Indeed, it would be true to say that agreements relating to *competitive* traffic have advanced side by side with the increase of such traffic, just as agreements relating to connecting traffic have gone along with that business. And it would also be entirely true to say that whatever of uniformity, stability and equality in rates, ease and convenience in shipping—indeed, whatever of excellence the railroad service may have exhibited in any respect, is largely due to agreement between competitive lines—and that nearly everything in the shape of instability, inequality, confusion and demoralization has sprung up in the absence or failure of agreement, and is strictly imputable to such absence, or failure. These agreements have not been wholly ineffectual, as is said, or intimated, in the opinion in the Trans-Missouri case. They have been, in the main, effectual. Though broken in multitudes of instances and the breaches always followed by war, still the condition of agreement has been the rule, and war the exception.

The last form which agreements of this character reached in their progress prior to the Inter-state Commerce Law, was that of *pooling*, by which either the traffic was divided beforehand between the rivals in agreed proportions, or a similar division made of the money receipts. Such a resort could, from its

nature, be made acceptable only in the last extremity, and after failure to enforce the observance of agreed rates. It compels the strong rivals to abate from their own estimate of their capacities and consent to award business to roads which could not, in a protracted struggle, vindicate their right to it.

A view of public policy, now widely thought to have been erroneous, led to the introduction into the Inter-state Commerce Act of a prohibition of this form of agreement between competing railroads, and the effect of this and other provisions of the same law was to subject the whole business of railroad transportation to vastly increased difficulties which are next to be considered.

The Inter-State Commerce Law and Its Effects.

We have already seen that the original policy in this country of making the business of railroads free to all, of necessity made it a *competitive* business. This was, of course, the *intention*, but, at the time, the pre-eminent importance of uniformity and equality in rates was not foreseen. In its early stages the business of transportation amounted to but a small fraction of its present magnitude and had been entirely in the hands of private carriers by land and water. The importance of uniformity and equality not being so obvious, and there being no methods of state action by which they could be secured, there was no thought of attempting to secure them. The desirability of securing rates reasonably low was, of course, obvious; but it was rightly supposed that this would be brought about in the same manner as in other things, by leaving the business open to competition.

With the progress of railroad extension, however, the need of stability, equality, and uniformity in rates

became increasingly, and, at last, overwhelmingly, apparent, and the lack of them equally so. Under competitive conditions this was impossible except when brought about by agreement, and the necessities of competition, whenever conflicts broke out, dominated every other interest.

The consequence was a host of conditions—all thought to be mischievous, and some of them really so. At times there would be no rate at all, and no one could tell, even for the morrow, what to expect. The most powerful shippers had the advantage, and could crush rivalry simply by the better rates they were able to command. The grossest favoritism was suspected, and often upon sufficient grounds. Long hauls were made at lower prices than short ones, and though there were often found reasons for this, there was sometimes a lack of sufficient reason. But the loudest and most just complaint was of *inequality*. The most skilfull, the most powerful and the most unscrupulous shippers had a constant advantage. There was complaint of charges as being unreasonably high; but this charge was really grounded upon the inequality. Where more is exacted from one shipper than from another, the former not unreasonably thinks that the charge imposed upon him is excessive, rather than that allowed to the other is too low.

The Inter-state Commerce Law of Feb. 4th, 1897 was the fruit of the loud public clamor. This act, admirable in its main purposes, and excellent in many of its provisions, was yet framed without sufficient regard to some necessary incidents of railway transportation and without sufficient reflection upon what could, and what could not, be accomplished by legislative enactments. Its framers aimed to secure equality, uniformity and stability in rates, but failed to see that this could be fully and permanently established only by those who have the power to fix rates, that is, the *owners;* and that if the government wished to accomplish this end by its own action, it must make itself the

owner. They required uniform charges for the same service, publication of rates, public notice of any change, and forbade any greater, or less charge for any service than the published rates, and supposed that railroads left under the stress of the fiercest competition would be able to obey those requirements. This expectation would not have been unreasonable, *provided* the roads were left to the free exercise of the means absolutely essential to enable them to obey, that is the power to *agree* with each other as to rates and to contrive the means to make their agreements effectual. But they prohibited, at the same time, the only form of agreement which had as yet been found fully effective, that is, the pooling agreement.

That Congress *expected* uniformity and equality in rates to flow as a consequence of the legislation cannot be doubted. These were the main objects it had in view. And we can hardly suppose it to have been so ignorant of the necessary conditions under which the law was to operate as to think that these ends could be reached unless *some* agreement was effected as to rates. Deadly competition, at that time prevented only by pooling agreements, would immediately spring up, unless such agreements were replaced by others not prohibited. If all the competitive lines should frame, file and publish schedules of rates as required by the law, and without communication with each other, the schedules would not agree, and the lines fixing the higher rates would at once perceive that the bulk of the traffic would flow to their rivals who had underbid them. Their only alternative would be (if they obeyed the law) to at once frame and file lower rates; and these would be put at a point supposed to be sufficient to draw traffic. The others, finding themselves outbid, would be compelled to file and publish new and still lower ones, until the point was reached, and probably passed, which would leave any profit. But inequality would still subsist and the bitter alternatives would be either to obey the

law and lose the traffic, and die then and there, or resort to secret and unlawful competition and make the best bargains possible, from day to day, with each shipper. It is not open to doubt which of these alternatives would be accepted. To suppose that law will be obeyed where the consequence of obedience is the certain ruin of property amounting to millions in value, and when it can without certain detection and punishment be evaded, is an illusion which can hardly be imputed to intelligent men. The consequence would be that one of the rivals would disregard its published rates and make secret bargains, and the rest would immediately follow.

All this being apparent to the companies, as soon as it became probable that the Inter-state Commerce bill would become a law, and long before it became such, they began diligently the work of *agreeing* upon rate sheets to be filed This was a work of difficulty; although the difficulty was diminished by the circumstance that uniformity of rates, more or less faithfully observed, already existed as the fruit of agreement; and thus agreements between the principal competitive lines were reached before the passage of the act, and schedules were made, filed and published within the prescribed time thereafter. This framing and filing of rates by concert was itself a new agreement, and, inasmuch as it was not to be expected that any of the parties would willingly make an *open* departure from the agreement, by filing different rate sheets, and as secret departures were made criminal, much hope was entertained for permanent uniformity.

The result, however, was similar to what had many times before happened in the case of agreements, other than pooling. When one of the parties found that the rates agreed upon and published were not enough to secure a living, freight was secretly taken at less rates. This could not long be concealed from the other parties. The course of shipments speedily reveals to a practiced eye any changes in actual

charges; and, upon strongly confirmed suspicions of a departure by one road, similar departures were made by others in order to retain patronage. The published rates became at once nominal, and peace was displaced by ruinous war.

Of course no company, perceiving that it was underbid, could defend itself by *publishing* lower rates and adhering to those. The mere publication would furnish the unscrupulous rival with the very information needed in order to carry on secret competition with the greatest facility. It would know the precise rate which it had to underbid. If one competitor employs the weapon of secret competition, the others must, or retire from the field. The result was that the whole competition became secret, but now with very grave consequences of another character. What before the Inter-state Commerce law was innocent, now became a crime. The published rates were not observed, and men of the highest character for integrity were driven into dishonest and criminal conduct. They shrunk from direct personal guilt; but the effective instrumentalities were familiar. These consisted in the employment of soliciting agents with no other instructions than to get the traffic. The rates named in bills of lading might be the published ones; but a secret rebate, or some other concealed concession, would attend them. Henceforth all uniformity and equality—the very objects sought by the law—were at an end. Criminal violations of law rapidly increased and threatened to become universal. The law, itself, furnished no safeguard against them. It was of no utility for honorable railroad officers to complain and seek to put the District Attorney in motion. They could furnish him with no legal evidence, and when he set the grand jury at work, witnesses refused to testify, and invoked the constitutional safeguards. In short, the effect of the law was not to secure uniformity or equality, but to make both impossible, and to add an abounding crop of misdemeanors,

dishonest concealments, perjuries and abortive efforts at punishment.

The present agreement grew out of this hideous condition of things. It was the effort of honorable men to enable themselves to carry on the most necessary of all businesses without ruin to the property employed, and without crime. The situation was unendurable, and demanded an earnest effort to discover whether some agreement, other than pooling, could not be contrived which could be enforced, and which would be effective. Whether the one actually devised will be effective, if it should be sustained, cannot be absolutely affirmed. It has not as yet been fully tried; but there is no objection to it of a legal nature which, upon any principle heretofore declared, can be sustained. Its object is not in any degree to create a monopoly, or raise rates; not, in any degree, to suppress, or check, competition, other than secret and illegal competition. It punishes no conduct except *criminal* conduct. It seeks no other end than to maintain and enforce the observance of the Inter-state Commerce Law, and to secure the stability, uniformity and equality, which are the chief objects of that law.

But this must not be left to assertion. It must be shown by a scrutiny of the agreement.

The Present Agreement, Its Provisions and Effect.

Its objects, as declared in its preamble, are, in brief, to aid in fulfilling the purposes of the Inter-state Commerce Act, to co-operate for the establishment of reasonable and just rates, fares, rules and regulations on State and Inter-state traffic, to prevent unjust discrimination, to secure the reduction and concentra-

tions of agencies, and the introduction of economies in the conduct of the freight and passenger business.

So far as rules and regulations are concerned, nothing need be said. No one will question the utility of an organization of companies engaged in a business of such vast extent, in which the action of the various parts are so inter-dependent, for the reduction of the conduct of the business to simplicity and order by subjecting it to reasonable rules.

It is only those provisions which relate to the *rates upon competitive traffic* which it is material to consider. The scheme which these are designed to carry into effect is extremely simple. It embraced the following principal features:

FIRST.—It starts with the assumption, admitted on this hearing, that the schedules of rates already framed, filed with the Inter-state Commerce Commission, and published by the several parties, are reasonable and just, and binds the parties to observe the same until they are changed. (Art. VII, Sec. 1.)

SECOND.—It provides two methods by which any rate thus agreed to may be changed. (1) By the action of the Board of Managers of the Association, upon which authority to that end is conferred. This Board may act on its own motion, or upon the application of any member of the Association. The change may be general, that is, one affecting the traffic of all the lines, or it may be confined to one or more roads. (Art. VII, Sec. 2). (2) If any member of the Association wishes to change a rate it may apply to the Board of Managers for that purpose, and if the application is unsuccessful and the member still wishes to make it on its own road, it is at full liberty to do so; but as this means, or may mean, that such company designs to start a competition in rates, it must give notice of this to the managers, so that they may take measures to meet it. This notice is effected by requir-

ing that the company intending the change should make it by a resolution of its Board of Directors, a copy of which is to be sent to the Board of Managers; and the change does not become effective until thirty days thereafter. (Art. VII, Sec. 2). Unless this restraint for thirty days, designed solely to prevent *secret* and *illegal* competition *in rates*, and to compel an observance of the Inter-state Commerce Law, is to be regarded as restraining competition, so as to *restrain trade*, there is no *appearance* even of a restraint of trade anywhere in the agreement.

THIRD.—The agreement is enforced by requiring from each company an original deposit of five thousand dollars, and such further monthly payments as the Board of Managers may determine, proportioned to the company's business, and by imposing a forfeit upon any offending company, not exceeding five thousand dollars, which fine is charged to the account of the offending company, and such company is required to keep its account good. The expenses of the Association are also paid from the same fund, and, at the termination of the agreement, what remains is to be divided among its members. (Articles XVI and XVII.)

THIRD.—The powers of the Association are vested in three bodies: (1) A Board of Managers, which has the principal authority in relation to rates, and is composed of nine members, one named by each of the through competitive *lines* or *systems*, each of which may embrace many different companies (Art. 4, Sec. 1); (2) A Board of Control, consisting of the Presidents of all the companies; but no system is allowed more than three votes in the aggregate; (3) A Board of Arbitration, composed of three disinterested persons selected by the Board of Control.

The above description sufficiently discloses the gen-

eral scheme of the agreement: but some few observations are necessary to explain its practical operation:

1. If any company is dissatisfied with the action of the Managers on *rates* and *fares*, except *differentials* (which will be subsequently explained), and does not determine to take separate action, it may appeal to the Board of Control (Art. III., Sec. 7).

2. If any member of the Association chooses to exercise its own pleasure as to whether it will abide by the agreed rates, which, as we have seen, it may do, without abandoning the Association, or subjecting itself to any penalty, and enter into competition in rates, it then becomes necessary to determine what action the others will take. Any individual member may, of course, meet this action in its own way by changing rates in the same manner; but if it desires the concurrence of the others, it may invoke the action of the Managers, and in that case, or even on their own motion, the Managers may proceed to determine what action shall be taken, and it is made their duty, in case the defection should injuriously affect some particular members more than others, to endeavor to furnish reasonable protection to such members, presumably by allowing them to change rates so as to meet such competition, or by recommending such fierce competition as to persuade the recalcitrant to fall back into line. So, also, if some carriers, railroad or water, not members of the Association, challenge competition with its members, it lies with the Board of Managers to determine how this competition is to be met.

All this, it will be perceived, is designed, when war breaks out, to prevent it from becoming general and ruinous, and to limit the field of hostilities.

3. This being an agreement designed to prevent its members from slaughtering each other, it is a fundamental notion that all shall have a fair chance for life according to their several and respective abilities. But experience, with its shifting conditions, might show that, in its effects, it was operating so as to deprive some member of the power to sustain itself. The traffic might be found to be flowing differently from what was expected. Under such circumstances the imperilled member would be compelled to exercise its privilege to renew competition in rates unless it could induce a concession on the part of the others. Such a condition may be met in a variety of ways. As all particular soliciting agencies (the fertile source of dishonest and mischievous competition) are abolished by the agreement, except with the approval of the managers (Art. XII.), they may allow the complaining company to have, under their supervision, soliciting agents, and this may suffice; or, they may instruct the joint agencies, which they have power to establish, (Art. XI.) to direct traffic, otherwise undestined, to such company; or, they may permit it to reduce rates for its own line to such an extent as to draw an increased traffic, which is what is called the allowance of a *differential.*

This provision it will be observed, is purely subsidiary to that main feature of the agreement designed to prevent *secret* and *unlawful* competition in *rates.* It must be born constantly in mind that this is the only competition sought to be prevented. *Open* competition upon every point, even upon rates, is in no manner prevented. But no agreement designed to prevent *secret* and *unlawful* competition can be really effective which does not furnish the weaker roads with some reasonable assurance that it is to their *interest* to accept it, that is, that they will be better off, in the long run, by accepting it than by taking their chances in a life and death struggle. It is this *assurance* which it is the object of this provision to afford. It assumes,

what must necessarily be assumed, that joining in the agreement means life and not death, and that there is traffic enough to enable all to live, and that, in order to secure life, there is no other method than that of selecting the most disinterested agency procurable, which shall from time to time determine, under the shifting conditions, how much is necessary to life, when one road is gaining, and another losing, traffic.

So far as respects all forms and modes of competition, save one, the agreement saves and cherishes competition. The improvement of tracks and equipment, increase of facilties, safety and dispatch in the conduct of the service are all encouraged. The more these qualities are exhibited by every line, the larger the traffic it gains, and all these increased rewards are its own. It is competition *in rates* only which is aimed at; and this is not *forbidden*, directly or indirectly. Every company is left at liberty to engage in it. The existence of such competition is indeed regarded as a savage anomaly which ought not to exist, and the effort is made to repress it, not by prohibition, but by *doing away with the occasion for it*, by establishing *uniform rates* and giving to each company which may happen to find that these rates are not sufficient to enable it to get a living business a chance to ask for concessions which will compensate for its disadvantages and enable it to obtain more of the traffic. If any company prefers not to accept this opportunity, but to start a competitive strife in rates, it is at liberty to do so; but, it being well known that this strife, unless regulated, will at once become a *secret*, dishonest, and unlawful competition, a provision is made *regulating* it and requiring it to be *open*, *declared*, *honest*, and *legal*. A temporary adherence to agreed rates is indispensable to this, and such adherence for the period of not exceeding thirty days is made obligatory.

If the above is a just description of the agreement no other question can be made upon it than this: Is

an agreement designed to convert, and necessary in order to convert, competition in railroad rates from utter and destructive and lawless savagery into order, peace and legality, a *restraint upon trade* which Congress *intended* to condemn and punish as a *criminal offence?*

But the functions, which agreements of which the one in question, is an example, cannot be fully comprehended until we clearly understand *the connection and relations between railway competition and manufacturing and commercial competition.*

Every one will recognize the fact that competition is everywhere present in all the industrial pursuits of life. The moment men abandon savage conditions and engage in industry, they are in competition with each other, and the competition springs up, not only between individuals, but between communities. Nor is it limited to communities of the same nation; but, to such a degree have all parts of the world been brought into easy communication with each other, that industrial strife arises and grows more and more intense between nations. Manufacturers and merchants in different cities and towns on the line of the same railroad are dependant, both for the supply of materials and the sale of products, on the same market, and thus come into competition as communities. The same thing is true of manufacturers and merchants in communities situated on different roads. The same is true of producers and consumers of different nations. America and Russia are competitors in supplying the world with petroleum. The wheat growers of India, Russia, South America and the United States are in direct competition.

Inasmuch as the competition compels the rivals to avail themselves of every advantage they can gain, the matter of rates for transportation becomes a highly important and, indeed, a controlling feature. Take the case of two manufacturers of the same article in the same place. If one can obtain better rates than

the other, he can reduce the profits of his rival, and even crush him. Consider the enormous and inexcusable injustice of this. The defeated party might be the most skillful, the most industrious and energetic, and, therefore, entitled to prevail in the struggle. He finds himself defeated, and perhaps ruined, not by the superior merits of his adversary, but by *the interposition and aid of a party engaged in the performance of a public function*, who ought to have preserved the most rigid neutrality. Take the case of two cities situated at similar distances from a railroad centre with which they are connected by branches respectively. Let it be supposed that the merchants and manufacturers in one succeed in obtaining an advantage in railroad rates to and from a distant market upon which both are dependant for purchases and sales. A whole community may be ruined; and the instrumentality through which the ruin has been effected is a *governmental power committed to private hands*, which should have been scrupulously neutral.

The neutrality—*the absolute neutrality*—of railroads in all the competitions of men is a fundamental axiom of state policy from which no departure should ever be permitted. This neutrality means *uniformity in rates*, and can never be otherwise preserved. Men compelled to strive with each other in the thousand competitions of life must have the right to equal rules secured to them in some form. A denial of it, and especially a denial by government, would be an atrocity.

These mischievous consequences of the combination of railway and commercial competition, inevitable when the former is left unregulated, were among the principal causes which led to the enactment of the Interstate Commerce Law. That law proceeded upon the theory that individuals and communities, in the race for supremacy, should not be subjected to discrimination on the part of carriers; that the power to put up, or pull down, so clearly possessed by the great

carriers, and supposed to be so often exerted, should be no longer wielded, so far as it could be prevented. *Natural* advantages, such as felicity of situation, superior enterprise, skill and industry, it was neither possible, nor desirable, to take away; but artificial and arbitrary advantages offered by those engaged in the performance of a function essentially public was justly viewed as mischievous and unjust in the highest degree. If government itself had retained in its own hands the actual performance of this service, no such advantages would be permitted. It was thought that in entrusting this service to the hands of private individuals they should, so far as was possible, be precluded from making such a use of it. They could not be thus precluded except by being required to establish and adhere to *uniform rates*.

There were several ways which might be suggested for bringing these about. Government ownership, were such a thing possible, would be one. The government would then fix rates according to some scheme of justice and equality, and make them *permanent*, and thus limit competition to the just arena of natural advantages by destroying it elsewhere. This, however, was not to be thought of. Besides other insuperable obstacles, no ownership, except that of *all* railways by the United States, would be effective; and the United States had no power to acquire the ownership. It could do no more than to control *inter-state* transportation.

Another method has often been suggested, and in some instances attempted by particular states, and that is to *fix uniform rates* by *legislative enactment*; but no enlightened government, clothed even with absolute power, has ever attempted it. That it could be done under a *constitutional* government like ours seems unthinkable. This is a *power of ownership*, and can be exercised only by the owner. No railroad subjected to free competition, as all of ours are, can help carrying at all times some, and very often enormous,

amounts of goods at less than cost. Its own view of its own interest may advise it to do this. But no power, except that of an absolute tyrant, can compel a man to perform a service for others at less than cost and against his will.

We have said that no enlightened government has ever attempted this. We do not forget that in the opinion in the case of Munn *vs.* Illinois, a single instance of an attempt by the British Parliament to fix the rates for the carriage of goods, and another by a municipal ordinance of the City of Washington to establish charges for hackmen, were referred to in order to support the proposition, not necessary to the decision, that the fixing of rates was a proper exercise of legislative power; and we admit it to be practically true that a power to fix railroad rates involves the power to compel the carriage of large quantities of freight for less than cost. But these are no real exceptions to the statement that no enlightened government has ever adopted such a measure. The British statutes referred to were never executed, and were subsequently repealed with the penitential confession that they were not enlightened exertions of legislative powers. (See the repealing Act in the Appendix). The municipal ordinance referred to was entirely defensible as an exercise of the *police* power to prevent extortion and imposition upon the unwary and necessitous. If popular prejudice and misconception, tempted by false representations, have succeeded in some states in inducing the assumption of a legislative power to fix rates, the error has not yet affected the action of Congress; but it is not a comfortable reflection that the fundamental rights of property should be better protected by a legislature like the British Parliament clothed with absolute power, than by those whose power is restricted by written constitutions declaring that no men shall be injured in person or property without due process of law.

A third method was entirely within the power of

Congress, but would be only partially effective even if it could be enforced. This was to directly prohibit discrimination and require similar services under similar circumstances to be rendered for the same rates. This would be effective to prevent discrimination *by any particular road*, but would not secure the same charges by different roads for similar services. This could not be done without destroying competition in rates, which it is impossible for a legislature to destroy so long as private ownership subsists, and even this could be made operative by Congress only in respect to inter-state commerce.

This method, however, being all that was practicable, was put in force by the following clauses of the Inter-state Commerce Act which constitute the substance of the whole enactment, its other provisions being, in the main, subsidiary only.

"Sec. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or

locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in a like business.

"Sec. 4. That it shall not be lawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however,* that upon application to the Commission appointed under the provisions of this Act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for transportation of passengers or property, and the Commission may from time to time prescribe the extent to which said designated common carrier may be relieved from the operation of this section of this Act."

It has been shown above that *uniformity in rates*, which Congress has justly deemed so essential, and has sought to bring about by most stringent enact-

ments, operating through the field of its limited jurisdiction, is just as important in the case of different *competing* roads, as in the case of a single line. To effect this is a function of *regulation*, and of regulation of momentous importance. There should be *some* agency *somewhere* competent to discharge it, and able to discharge it. The railroad companies do not, in general, initiate this participation in the competitions of other business. It is brought about for the most part by the efforts of their patrons. But, by whomsoever brought about, it should be prevented. It can be prevented only by establishing *uniformity in rates*, by which we mean, not merely the *same* rates where all the conditions are the same, but corresponding rates where the conditions are different.

And here comes into distinct view the true and important feature of the Association under notice. *It is an institution for the regulation of transportation business in those respects where the State, either from lack of jurisdiction, or because it deemed that the regulation could be best devised and administered by the railroad systems themselves, has chosen not to regulate it.* And while the agreement contemplates regulation generally, yet the end which it regards as of principal importance is the securing of *uniformity in rates.*

How it accomplishes this, its principal work, and how it is calculated to secure, and does secure, the neutrality of railroads in the competitions of business, should be shown by giving illustrations of its daily work.

It has a building with extensive offices and a large array of officials and clerks. These embrace those who, by knowledge, skill, and long experience in the actual business of railroad transportation, have become the most accomplished experts in that business. Let it be supposed that there are manufactories of wagons, or chemicals, or any other article, in Michigan, long established and carrying on a prosperous trade, and with New York and Philadelphia as the principal markets. Another man or company

contemplates the establishment of a similar factory in Indiana for the same markets, and one of the important, probably the most important, thing for him to know is what rates he can obtain for the shipment of his product to market. He goes to a railroad company and informs it that if it can give him a certain rate, which he knows to be lower than the Michigan makers enjoy, he will be able to supply it with a large traffic. If there were no regulating agency governing the action of the roads, the company thus applied to, tempted by the prospect of business, would grant the rate and the manufactory might be started. Very soon the Indiana manufacturers would find themselves undersold and would not be long employed in ascertaining the cause. They would go at once to the line employed by them, give information that rivals in another State were obtaining better rates and insist upon a reduction for themselves. The company would at once see that such a reduction was necessary in order to enable it to retain that part of its business, and would grant perhaps a lower one, and thus the railroads become the participants, which they ought never to be, in the competitions of their patrons. But under the agreement with which we are dealing such an affair would receive a different treatment. The railroad company in Indiana on receiving the request, if it desired to grant it, would communicate with the Joint Traffic Association and inquire whether there was any objection. The proper officer of that association would at once communicate with the Michigan office, and with other roads carrying similar products to market, and inquire whether there was any objection. These roads would communicate with their patrons and these would object, or, rather, say they had no objection, provided a corresponding reduction were granted to them. The matter must then be submitted to the Board, which contains representatives of every railroad interest, and consequently representatives of the interests of all the

rival manufacturers, and will not be decided in favor of any particular manufacturer. If any change be made it will be a *uniform* change.

And the question will be decided upon the true grounds of fairness and justice. This will be so because it is for the *interest* of all the roads in the Association that it should be so. When we reflect that such cases are multitudinous and present themselves in every variety of shape, we must see that permanent and just rules alone enable the work to be done. No favoritism can be shown one class of merchants represented by one road, for its rival, which represents the rival merchants, has a representation on the Board. It may be suggested that the question would be likely to be settled in the interests of the railroad companies. That may be; and if their interest were in any way hostile to those of their patrons there would be something to think about; but there is not. The owners of railroads well know the conditions of their own prosperity, and that railroad business *generally* is not promoted by high rates; and are never slow to reduce a rate if thereby they can largely increase the aggregate amount of business.

It is well known that the rates on the shipment of the great staples from the West to the seaboard are fixed by the united action of the railroads, at certain sums. Whoever has the power of determining these may transfer the sceptre of commerce from, or to New York, or Philadelphia, or Baltimore. A mere trifle of a change would suffice. The merchants of New York are now clamoring that Baltimore is favored; but if the judgment of all the merchants in all the cities were taken as to the most competent, intelligent, and just tribunal to determine the question, it would be in favor of the tribunal with which the decision now rests.

We thus perceive that the main purpose of the agreement we are considering is identical with that of the Interstate Commerce law, a purpose which

that law was unable to accomplish, except to a very limited extent, in consequence of the limitations of Congressional jurisdiction. Most of the industries and interests of life when they assume great magnitude need *regulation*, which must be provided either by law or private effort, or by both. The great railroad transportation business needed uniformity in rates, and the efforts of the companies had been, prior to the law, insufficient to bring it about. Congress supplemented these by enacting the law, but was unable to accomplish the whole work. The agreement under notice is a further private effort toward the same end. What a strange policy to say that proper and necessary regulation, when brought about by law, is a blessing; but when effected by the voluntary action of individuals in those cases which the law cannot reach, is a crime!

IV.—The foregoing statement of the growth of our system of railway transportation, and the way in which it is affected by the unrestrained competition to which it has been intentionally subjected from the beginning, and the regulative action which the railroads have found it necessary to take by means of agreements and associations, has, in order that the attention might not be continually diverted, been drawn up in untechnical form and accompanied with little reference to particular proofs.

All the matters of fact contained in it are, however, fully substantiated:

1. By the very nature of the case. All can see that unrestrained competition acting upon the conditions which the railway system presents must necessarily lead to the results therein set forth.

2. The leading features of a business so universal, and so plainly under the observation of every one, and so frequently brought before judicial observation, possess that *notoriety* which requires courts to take judicial notice of them.

3. But neither of the above modes of authenticity need to be relied upon here. All the substantial facts relating to the origin and growth of the system, the action upon it of unrestrained competition, the mischiefs which that competition has brought about, the methods which have been naturally and necessarily employed to correct such mischief by voluntary agreements, the causes which, after the enactment of the Inter-state Commerce Law, made prior agreements ineffectual, the shaping of the agreement now before the Court in such manner as to meet the new exigencies created by that law, and the actual intent of the parties in framing it, are set forth in the affirmative parts of the principal answer, and are admitted by the setting down of the cause to be heard upon bill and answer. (Answer.—Paragraphs XIII. to XXII., inclusive.)

4. If further illustration were needed of the magnitude of the mischiefs brought about by unrestrained competition, of the impossibility of checking and preventing them in any other way than by mutual understanding and agreement between the railway lines, of the efficacy of that method, and of the necessity for *voluntary self-regulation* through co-operative agreement and association, it will be found in abundance in the often-repeated declarations of the Inter-state Commerce Commission, the regulating body created by Congress itself, which fully show that the system of government regulation is wholly insufficient to bring

about the beneficial results for which it was established, unless it is supplemented by voluntary and concerted agreement among the railroads themselves. Among these declarations the following are referred to, and submitted to the attentive consideration of the Court:

"To make railroads of the greatest possible ser-
"vice to the country, contract relations would be
"essential, because there would be need to be joint
"tariffs, joint running arrangements, an inter-change
"of cars and a giving of credit to a large extent,
"some of which were obviously beyond the reach of
"compulsory legislation, and even if they were not,
"could be best settled and all the incidents and quali-
"fications fixed by the voluntary action of the parties
"in control of the roads respectively.

"Agreements upon these and kindred matters
"became, therefore, a settled policy, and short, inde-
"pendent lines of road seemed to lose their identity
"and to become parts of great trunk lines, and asso-
"ciations were formed which embraced all the mana-
"gers of roads in a State or section of the country.
"To these associations were remitted many questions
"of common interest, including such as are above re-
"ferred to. Classification was also confided to such
"associations, it being evident that differences in
"classification were serious obstacles to harmonious
"and satisfactory inter-change of traffic. But what,
"perhaps, more than anything else, influenced the
"formation of such associations, and the conferring
"upon them of large authority, was the liability,
"which was constantly imminent, that destructive
"wars of rates would spring up between competing
"roads, to the serious injury of the parties and the
"general disturbance of business.

"Accordingly one of the chief functions of such
"associations has been the fixing of rates and the
"devising of means whereby their several members
"can be compelled or induced to observe the rates
"when fixed. And in devising these means the chief

" difficulty was encountered. Agreements upon rates " were voluntary arrangements which could be de- " parted from at pleasure, and if they had behind " them no sanction, they were not likely to stand in " the way of a war at rates when the provocation to " one seemed sufficient. Accordingly, the scheme of " pooling freights or the earnings from traffic was de- " vised and put in force through the agency of these " associations, as a means whereby steadiness in rates " might be maintained. The scheme was one which " was made use of in other countries and had been " found of service to the roads.

" The pooling system was looked upon with distrust " by the public, mainly because it seemed to be a " scheme whereby competition between roads could " be obviated, and rates for railroad services put up or " kept up to unreasonable figures. But if railroad " managers supposed that by this scheme they were " to stop competition among themselves, the result " has not answered their expectations. The compe- " tition has still gone on; each road striving to obtain " as large a share of the business as possible, and no " agreement among them could altogether prevent a " yielding to the pressure of shippers for lower rates.

" In 1877 when the pooling system was put in " force by the Trunk Line Association, the rates " charged on the first, second, third and fourth " classes of freights from New York to Chicago " were respectively, 100, 75, 60 and 45 cents " a hundred pounds. They are now 75, 65, 50 " and 35 cents, but the classification as to many " articles has in the meantime been reduced, so " that the actual reduction is greater than these " figures would indicate. Rates from Chicago to " New York, are also proportionately less. A sim- " ilar result has been apparent elsewhere. The " pooling system has done much to maintain " steadiness in rates, but the managers have not " been able by means of it to keep rates up to

" former standards. It has done something, how-
" ever, to check a prevailing tendency to consolida-
" tion. The motives to consolidation are diminished
" by any contrivance which removes obstacles to the
" inter-change of business and increases the facilities
" and conveniences for uninterrupted commercial in-
" tercourse. * * * *

" The pooling of freights and of railroad earnings,
" so far as the Commission has knowledge or informa-
" tion on the subject, came to an end when the act
" took effect. But as pooling was only one of several
" purposes had in view in forming railroad associa-
" tions, the leading associations have not been dis-
" solved, but have been continued in existence for
" other objects. Among these objects are the making
" of regulations for uninterrupted and harmonious
" railroad communication and exchange of traffic
" within the territory embraced by their workings.
" Some regulations in addition to those made by the
" law are almost if not altogether indispensable.
" Thus, while the seventh section of the act forbids
" the carriers preventing shipments from being con-
" tinuous by the device of changing time schedules,
" carriage in different cars, etc., it has not under-
" taken to provide for the making of such time sched-
" ules as would facilitate the continuous shipment, or
" to prescribe rules for the loading and movement of
" cars for that purpose. However desirable this
" might have been if it were practicable to make
" rules which, while general in their nature, should
" be sufficiently definite for enforcement as laws, it
" was doubtless perceived by Congress that these and
" many other matters of detail, though they might
" be of high importance, could not be wisely and
" effectively dealt with by general legislation, but
" that such legislation must chiefly be restricted to
" provisions for regulation and to prevent abuse.

" Moreover, these matters of detail, to a consider-
" able extent, involve the element of contract and

" also of credit when one company becomes the " agent for another in the sale of tickets and the col- " lection of freight moneys; and they then require " the assenting minds of parties, and the number of " parties whose minds are to be brought into accord " being commonly very considerable, an association " of officers or agents is made the means of bringing " about the desired unity of action, and is also made " a common arbiter, to prevent frequent and serious " disturbances.

" Classification also, as has been said, is not by the " Act taken out of the hands of the carriers, though " a certain power of supervision is vested in the " Commission; and classification is not only best " made by joint action, but if it were not so made " and the methods of the roads thereby brought into " harmony, it would probably become indispensable, " however undesirable it might otherwise be, for the " Law to undertake to provide for it. Moreover, " when classification is made and put into effect, it " becomes necessary to make provision for inspection " or some sort of supervision of its application, in " order to prevent its being employed as a device " for giving preferences as between shippers. A " fraudulent classification, through connivance of the " agent in making out deceptive shipping bills, has " often been resorted to for this purpose, and as the " fraud affects the competing carriers as well as the " shippers who are discriminated against by means of " the cheat, the carriers and the public are interested " in such a supervision of the work of all the roads " as will be likely to detect the fraud. Self-interest " on the part of the carriers will impel to this " supervision, and it is most generally done " through some common agency. If it shall be fairly " done as between the carriers themselves, it will tend " to the protection of the public, and the benefits will " be on the same line with those the act undertakes

"to establish or provide for" (Vol. 1 Inter-state Commerce Reports, pp. 669–671).

"It is greatly to be regretted that the same class-
"ification is not adopted by the carriers by rail in all
"sections of the country. The desirability of uni-
"formity is so great that the suggestion is frequently
"heard that national legislation should provide for
"and compel it. If such legislation should be adop-
"ted, it would be necessary to empower some tribunal
"to make the classification, and the difficulties which
"would attend the making would be very great. Re-
"lative rates would be involved in it, for classifica-
"tion is the foundation of all rate making. It was,
"very early in the history of railroads, perceived that
"if these agencies of commerce were to accomplish
"the greatest practicable good, the charges for the
"transportation of different articles of freight could
"not be apportioned among such articles by reference
"to the cost of transporting them severally, for this,
"if the apportionment of cost were possible, would
"restrict within very narrow limits the commerce in
"articles whose bulk or weight was large as compared
"with their value.

"On the system of apportioning the charges strictly
"to the cost, some kinds of commerce which have
"been very useful to the country, and have tended
"greatly to bring its different sections into more inti-
"mate business and social relations, could never have
"grown to any considerable magnitude, and in some
"cases could not have existed at all, for the simple
"reason that the value at the place of delivery would
"not equal the purchase price with the transportation
"added. The traffic would thus be precluded, be-
"cause the charge for carriage would be greater than
"it could bear. On the other hand, the rates for
"the carriage of articles which within small bulk or
"weight concentrate great value, would on that
"system of making them be absurdly low; low

" when compared to the value of the articles, an'
" perhaps not less so when the comparison was w
" the value of the service in transporting them.

" It was, therefore, seen not to be unjust to ap-
" portion the whole cost of service among all the
" articles transported, upon a basis that should con-
" sider the relative value of the service more than the
" relative cost of carriage. Such method of appor-
" tionment would be best for the country, because it
" would enlarge commerce and extend communica-
" tion; it would build up a large business, and it
" would not be unjust to property owners, who would
" thus be made to pay in some proportion to benefit
" received. Such a system of rate making would in
" principle approximate taxation; the value of the
" article carried being the most important element in
" determining what shall be paid upon it.

" Accordingly, and for convenience and certainty
' in imposing charges, freight is classified; that
" which comes in one class being charged a higher
" proportional rate than that which is placed in an-
" other. But other considerations besides value
" must also come in when classification is to be made.
" Some articles are perishable, some are easily
' broken, some involve other special risks in carriage,
' some are bulky, some specially difficult to handle,
" and so on. All these are considerations which may
" justly affect rates, and therefore may be taken into
" account in classification. But still others have been
" found potent. Every section of the country has
" its peculiar products which it desires to market as
" widely as possible, and it is not unwilling that
" classification should be made use of by the rail-
" roads which serve it as a means of favoring and thus
" extending the trade in local productions; favoring
' them by giving them low classification and thus
low rates, and discriminating against those of
other sections through a classification which rated
them more highly.

"It has been in the power of every railroad to "have a classification of its own; but the necessities "of an inter-change of business have brought about "agreements, *and the railroad associations have been "given the authority to make classifications for all their "members. Their labors in this direction have been "extremely important and useful;* they have been "steadily reducing the number of different classifica- "tions in the country, and steadily approaching a "condition of things in which there will be one only. "But in these associations, when in session for the "making of rates, each railroad has, to some extent, "had the district which was served by his road behind "him; he has felt the pressure of the interests there, "and contended for them as against the interests in "classification represented by others, not only be- "cause it was desirable that the road should favor "the policy its patrons favored, but also because the "same policy was likely to be beneficial to both" (Vol. 1, Inter-state Commerce Reports, pp. 667–668).

"The existing rates from Chicago and other west- "ern points to the seaboard cities have not been es- "tablished capriciously, nor reached by gentle and "harmonious methods. They are the result of many "years' contention and struggling, involving ruinous "rate wars between the different lines and repeated "and protracted negotiations, in which concessions "were necessary to arrive at an adjustment, finally "culminating in the creation of a board or tribunal in "which all the lines were represented for the settle- "ment of disputes and the maintenance of peace and "stability. The history of these contentions and "their effect upon the roads and upon business is one "of the most interesting chapters in the record of "railroad development in this country. Beginning "with eager rivalry and each line making rates inde- "pendently, and always with a view of securing the

" largest possible amount of business for itself, the " differences to Baltimore and Philadelphia against " New York were so great that wars were inevitable; " and after most serious losses had been sustained and " transportation demoralized, self-preservation, as " well as the general public interests, required that " destructive hostilities should cease and agreements " be brought about on some basis of common justice " and comparative equity. After several unsuccess- " ful experiments the present basis of rates to the " seaboard cities was established." (Boston Chamber of Commerce *vs.* Lake Shore & M. S. R. Co. Vol. 1, Inter-state Commerce Reports, p. 763.)

" The importance of steady rates may be shown by " placing in juxtaposition expressions of views on the " subject made by persons speaking from altogether " different standpoints. The president of a leading " railroad line, in a recent public utterance, speaks of " ' the enormous importance of reasonable, public, " ' and stable rates to the whole business of the coun- " ' try. Credit and prosperity in every business are " ' dependent upon the credit of railroad securities, " ' and these securities have now reached such an " ' enormous volume that they furnish the real basis " ' of our whole financial structure.' A business man " ' of Kansas City, not connected with railroads and " ' desirous of bringing them under further control, " ' writes to the Commission:

" ' The frequent and violent changes in railway " ' rates which have taken place during the past few " ' years, and which seem likely to be unabated, seem " ' to me to call for new legislation in the way of " ' amendment of the Inter-state Commerce Bill. " ' These changes are ruinous to all business men, as " ' well as the railways, and are the cause of great " ' discontent among shippers everywhere and espe- " ' cially to the farmers. What is needed is a fixed " ' permanent rate, which shall be reasonable, and " ' which can be counted upon by any one engaging " ' in business.' "

"Such views are being continually expressed, "and they well illustrate the opinions which prevail "generally in business circles."

"Steadiness of rates, then, is an object to be kept "in view in the public interest. In a recent passen- "ger rate war between roads extending east from St. "Louis, joint rates were in some instances reduced "several times in the course of a single day, until "they were made absurdly low—the reduction being "sometimes made without even waiting for the con- "sent of connecting roads, so that parties who had "purchased tickets would have found them not hon- "ored before they reached their destination, and been "subjected to great annoyance before redress could "be obtained had the connecting roads declined, as "they might have done, to accept the tickets and "share the losses. When the general passenger "agents had sufficiently subdued their belligerent "mood, the rates were suddenly advanced, with the "inevitable result that parties who had calculated on "the low rates and been enticed from their homes or "seduced into making an action in reliance upon them "found themselves to pay more than they had reason "to expect; they doubtless felt something the same "sense of being wronged that the people of a neu- "tral territory may be expected to feel when it is "overrun by the armies of belligerents."

"Permanence of rates was also seen to be of very "high importance to every man engaging in business "enterprise, since without it business contracts were "lottery ventures. It was also perceived that the "absolute sum of the money charges exacted for "transportation, if not clearly beyond the bounds of "reason, was of inferior importance in comparison "with the obtaining of rates that should be open, "equal, relatively just as between places, and as "steady as in the nature of things was practicable." 1st Report Inter-state Commerce Commission (1887), Vol. 1, Inter-state Commerce Reports, p. 653.)

"The tariffs now in effect have been examined "by the Commission with much care. It is found "that on many articles the rates from the Pacific "Coast to Denver are no greater than to points "further east. The differences which remain are "principally the result of different classifications. "In fact, the subject of classification lies at "the foundation of any attempt to place the "through and local business of the trans-continental "lines upon a relatively just and intelligible basis. "Nothing in the nature of a stated proportion can at "present be discovered. The matter is now in a "state of crystallization among the carriers them-"selves. The changes that have been made within "the past three months in the way of equalization of "tariffs and doing away with differences that have "long been maintained against interior points are "very noteworthy. So long as the carriers are "actively engaged in the rearrangement of the tariffs "and classifications, and while the changes made are "in the direction of conformity to the law, it is better "that the details of the matter be not interfered with "by the Commission. There are many factors in the "situation which are obviously uncertain. The sub-"ject must be dealt with as somewhat experimental. "It is not yet known that the present through rates "can be maintained with a reasonable certainty of "permanence, although the situation supports the "belief that they may be. The effect of the changes "that are being made upon the revenues of the "carriers has not yet been ascertained. Radical "measures taken suddenly might produce unforeseen "disasters." (Martin *vs.* Southern Pacific Co., 2 Interstate Com. Report, pp. 8–9.)

"Among the reasons most frequently operating to "cause complaints of rates may be mentioned:

"The want of steadiness in rates;

" The disproportion between the charges for long " and those for short distances;

" The great disparity between the charges made " for transportation by roads differently circumstanced " as to advantages;

" The extremely low rates which are compelled by " competition in some cases, and which may make " rates which are not unreasonable seem, on compar- " ison, extremely high.

" Some others will be mentioned further on.

" The want of steadiness in rates is commonly the " fault of railroad managers, and may come from " want of care in arranging their schedules, or from " want of business foresight. But more often, per- " haps, it grows out of disagreements between com- " peting companies which, when they become serious, " may result in wars of rates between them. Wars of " rates, when mutual injury is the chief purpose in " view, as is sometimes the case, are not only mischiev- " ous in their immediate effects upon the parties to " them, and upon the business community whose " calculations and plans must for a time be disturbed, " but they have a permanently injurious influence " upon the railroad service because of their effect upon " the public mind. When railroad companies de- " termine for themselves what their rates shall be, it " is not unnatural for the public to infer that the " lowest rates charged at any time are not below " what can be offered at all times, and that when " these are advanced, the company is reaching out for " extortionate profits.

" Now, there are few important lines in the country " that have not at some time in their history been " carrying freight at prices that if long continued " would cause bankruptcy. But to a large proportion of " the public the fact that the rates were accepted was " proof that they were reasonable; and when advanced " rates were complained of, the complainants, to " demonstrate their unreasonableness, go back to the

" war prices, and cite them as conclusive proof of what
" the companies then charging them can afford to
" accept. Many popular complaints have their origin
" in the ideas regarding rates which these wars have
" engendered or fed, and the evils of the controversies
" do not end when the contraversies are over, but may
" continue to disturb the relations of relations of rail-
" road companies with their patrons for many years
" afterwards." (Inter-state Commerce Reports, Vol.
" 1, p. 671.)

As we have before observed, railroad competition is not only pitiless and destructive in its nature, but also necessarily involves a resort to *unfair*, *dishonest* and *unlawful* means. It is needless to say that in the defence of life, if all means are not justifiable, they will, at least, be employed. This rule has no exceptions worth speaking of. In other employments there is less opportunity for unfair competition, because there are few, if any, legal requirements which operate as a restraint upon it. But railroad owners are obliged by law to *publish* their rates; and how can deadly competition be lawfully carried on in *prices*, when the competitors are bound to inform their adversaries what prices they propose to charge? As well might the general of an army be required to inform his adversary at what points and with what force he proposed to make his next attack. The consequence is that deadly competition between railroads always begins by a real, or suspected, *secret* cutting of rates, and is instantly followed by a corresponding secret cutting by all other rivals. *Laws* are wholly ineffectual to prevent this. They simply involve the addition of a host of evils and crimes, such as falsehood, misrepresentation and perjury, with their consequent public and private demoralization. The moment a law imposes a legal requirement of which

the necessities of a life and death struggle tempt a violation, any agreement arresting that struggle must *become* beneficent, if it were not so before.

Upon no subject have the opinions of the Interstate Commerce Commission been more emphatically or more frequently expressed than upon the evils of ruinous competition between railroads and the necessity of preventing it by *some form of agreement*. Many citations to this effect have already been made, and, from a possible multitude, a few only will be added.

The account of the rate war of 1888 (2 Inter-st. Com. Rep., 341), is quite instructive. In the course of it it is said: "We may go further and say that, "in all cases where arrangements have been broken "up under which parties have been competing for "business with maintenance of reasonable and steady "rates, and when obviously only mutual assent can "restore former relations, ordinary business prudence "will dictate that the first step taken should be in the "the line of an attempt to bring about a better under-"standing. Unfortunately in these cases, instead of "being the first step, it is very apt to be the last step "thought of; the first energies are devoted to the "infliction of mutual injuries.

"Sometimes these are continued until the parties "reach the point of exhaustion; sometimes their folly "is made apparent sooner; but in cases like the "present, where agreement, express or implied, at "length restores precisely the state of things existing "before the hostilities began, the intermediate "injuries are by the very restoration shown to have "been needless, if not positively wanton" (p. 344).

"But we desire to apply generally to every kind "of competition herein discussed the observation "above made, *that when competition leads to the "transportation of property below actual cost, fairly "computed, it ceases to be legitimate. Fair and reason-"able competition is a public benefit; excessive and*

"*unreasonable competition is a public injury. Competi-*
"*tion is to be regulated, not abolished.*" (1st Report Inter-state Commerce Commission (1887), Vol. I., Inter-state Commerce Reports, page 288).

"It may be truly said, also, that while railroad "competition is to be protected, wars in railroad "rates unrestrained by competitive principles are "disturbers in every direction; if the community "reaps a temporary advantage, it is one whose bene-"fits are unequally distributed, and these are likely "to be more than counter balanced by the incidental "unsettling of prices and interference with safe busi-"ness calculations. The public authorities at the "same time find that the task of regulation has been "made more troublesome and difficult through the "effect of war rates upon the public mind. These "are consequences which result so inevitably from "this species of warfare that it would naturally be "expected they would be kept constantly in mind "by railroad managers. It is inevitable that the "probability that any prescribed rates will be accepted "by the public as just shall to some extent be affected "by the fact that at some previous time they have "been lower perhaps considerably lower." (Vol. 1, "Inter-state Commerce Reports, 99, 671–672.)

"It is unfortunately true that *the reckless or unfair* "*competition* of one carrier may sometimes compel "another, whose management would willingly do its "business fairly and at remunerative rates, to retire "from some lines of business at competitive points; "but the course of conduct which compels this is "likely to be temporary and to be persisted in only "until the parties guilty of it are brought to more "reasonable action by their losses, or by the inter-"ference of stockholders, who are not likely to sub-"mit quietly to a permanent drain upon their re-"sources from such a cause.

"In all that is now said upon this subject, we have "in mind only carriers operating in a field of legiti- "mate competition whose business they mutually "contend for. A case may be supposed of long cir- "cuitous lines formed by a combination of carriers "for the purposes of a competition not justifiable on "any business or prudential reasons, but wholly ille- "gitimate. But as no such case is presented by the "facts before us, we abstain from any discussion of "questions it might present." (*Re* Chicago St. Paul & Kansas City R. Co.," 2 Inter-state Commerce Reports, page 148.)

"The proceedings on the hearing of this case "showed a want of harmony among railroad man- "agers that is lamentable, because it is every way "harmful. It is harmful most particularly to rail- "road property, but it is harmful to the general pub- "lic also, because it produces a general unsettling of "rates. *Every change in rates affects values; it dis- "turbs trade and alters to some extent the value of con- "tracts.*" (*Re* Chicago, St. Paul & Kansas City R. Co., 2 Inter-state Commerce Reports, p. 149.)

"But it can hardly be for the public good that "carriers by water should be subjected *to unreason- "able and excessive competition;* they ought, as much "as the carriers by rail, to be allowed to charge re- "munerative rates; and the carrier by rail does not "therefore make out a complete case, when called on "to justify extraordinary differences between his "rates at a point of water competition and at other "points, when he shows that at the former he made "the very low rates because otherwise he would not "have obtained the business. It may be that when "the case is examined in the light of the public in- "terest it will be manifest that he ought not to have "had it; that in taking it he had pressed the com- "petition to an extreme which, while it harmed the

" carrier by boat, was harmful also to points on the " railroad by reason of the great disparity in rates " which it created, and also because of its pro- " ducing so little revenue that the burden upon other " traffic was increased in consequence.

" *Undoubtedly the public good is best subserved when* " *all the carriers which the needs of the country re-* " *quire are suffered to do business at reasonable com-* " *pensation*, and when their rates as between all their " patrons are relatively as nearly equal and just as un- " der the circumstances they can be made. These " are facts which are sometimes overlooked in the " making up of railroad rate sheets when water com- " petition is to be taken into account and its legiti- " mate influence allowed for." (2 Inter-state Commerce Reports, page 256.)

" If it is important to the public that a railroad " once constructed should be maintained, the ability " to make charges that will render its maintenance " possible is also of public importance. When, there- " fore, the rate sheets are such that reasonable returns " are not probable, a public injury is threatened, and " the injury is accomplished when the natural result " of bankruptcy is realized. It is of little moment " that in the meantime the public reap an apparent " benefit from the low rates; the apparent benefit is " almost always illusory, for the unremunerative " rate sheets are seldom evenly balanced; they favor " particular towns or particular interests, or they go " spasmodically up and down and thus unsettle prices; " they are commonly made quite as much to injure " competitors as to benefit the party making them, " and it will generally be found that reasonable rates " adjusted equitably over the whole field of service " would have been as much better to the community " as to the carrier itself. This, however, may not at " the time be apparent; the public perceives what

" seems to be a benefit from low rates and the attend-
" ant evils which are not so obvious, may possibly not
" be, perceived at all." (2 Inter-state Commerce Reports, p. 258.)

" In considering whether there is any reasonable or
" even plausible excuse for them, we may freely con-
" cede all that is said by railroad managers regarding
" the difficulty of supporting their mutual agree-
" ments in the absence of any power to prescribe an
" effective sanction for their enforcement. Neverthe-
" less, an impartial observer is compelled to say that
" the methods now so frequently resorted to for the
" remedy of supposed grievances or for the punish-
" ment of supposed wrongs are methods which do not
" belong to the present age. They correspond to the
" methods whereby in a barbarous age a rude redress
" by force is sought for individual injuries. To make
" the adversary feel and fear the power to inflict in-
" jury is often the first and principal thought, and a
" rate is cut when in a ruder age it would have been a
" throat. The motive in each case is the same; to
" obtain a right, or extort a privilege, or punish a
" wrong; and the hostile act may be resorted to irre-
" spective of any question whether there are not legal
" remedies which are adequate for all purposes of sub-
" stantial justice.

" It is a pertinent question in this connection, who
" is hurt by this species of private warfare? The
" carrier aimed at primarily, perhaps, but the injury
" never stops there. The attacking party is almost
" inevitably injured, and the injury may even go to
" the extent of the destruction of the interests of
" holders of its stocks and securities. If it stops short
" of destruction, it may nevertheless impair the capa-
" city of the road for usefulness, and in either event
" what is done is matter of serious public moment.
" But the injury goes beyond the belligerents; it is

"likely to affect in a direct way many others, while "indirectly injuring the whole class.

"The public has an interest in being protected "against the probable exercise of any such power. "But its interest goes further than this; it goes "to the establishment of such relations among the "managers of roads as will lead to the extension "of their traffic arrangements with mutual respon- "sibility just as far as may be possible, so that the "public may have in the service performed all the "benefits and conveniences that might be expected "to follow from general federation. There is "nothing in the existence of such arrangements "which is at all inconsistent with earnest competi- "tion. They are of general convenience to the "carriers, as well as to the public, and their volun- "tary extension may be looked for until in the strife "between the roads the limits of competition are "passed and warfare is entered upon. But in order "to form them great mutual concessions are often "indispensable, and such concessions are likely to be "made when relations are friendly, but are not to be "looked for when hostile relations have been inaugu- "rated." (Vol. 2, Inter-state Commerce Reports, pp. 263–264.)

We have referred to the practice of employing soliciting agents, and the somewhat kindred one of establishing transportation *lines*, Red, White, Blue, &c., as, in large degree, fruitful in violations of law, dishonest artifices and wasteful expenditure. It has been the subject of unsparing condemnation, repeated over and over again by the Inter-state Commerce Commission. Let the following extract suffice:

"Another cause of underbilling is found in the "active competition for traffic, under the stress of "which a vast number of soliciting agents are em- "ployed, whose offices are found not only on the "corners of the most expensive streets of every city,

" but in the rural communities as well; and who rep-
" resent both in their fixed establishments and in
" their movement up and down the land not only the
" carriers directly, but also various so-called 'lines'—
" red, white or blue, as the case may be—whose only
" interest is to obtain traffic; who have little respon-
" sibility of their own or to their ultimate employers;
" and whose object in life is necessarily to make a
" record of success in securing business which shall
" warrant the continuance of their employment and
" of their pay. All this gilded advertisement and
" persistent solicitation in the end is paid for by the
" public. The business exists and the public service
" of transportation must be done, whether or not
" any agent intervenes to help along the contract.
" Whatever arrangements and considerations are de-
" vised for the purpose of securing a shipment to a
" given line are necessarily at the expense and to the
" prejudice of some other shipper. In maintaining
" these methods of operation the carriers afford
" opportunity for the creation of favored individuals,
" localities and description of traffic in contravention
" of the letter and the spirit of the law. Without
" the most rigid supervision the system cannot fail to
" be dangerous.

" Moreover, when soliciting agents are compensated
" by the payment of commissions, the danger is
" largely increased. The division of a commission
" between the soliciting agent of a railroad or of a
" line and his customer obviously operates to give the
" shipper a lower rate of freight than the published
" schedule, and as the matter is within the control of
" the agent's employer, the carrier which permits it is
" responsible for the violation of law involved.

" And on the other hand, the local agents employed
" by the carriers to receive and forward merchandise
" from stations are naturally, in many cases, men who
" are not upon the highest plane of honorable con-
" duct. It appears that temptations of such agents

" by shippers are not unknown nor always unsuccess-
" ful. A trifling gratuity to a station agent may
" easily be so expended as to save many times the
" amount to his customer. The possibilities for
" fraud which may be contrived between unscrupulous
" shippers and weak or unreliable employees are
" enormous." (Inter-state Commerce Reports, Vol. 1, p. 817.)

We content ourselves with offering one more extract which clearly shows the difficulty of preventing the evasion of the prohibitions of the Inter-state Commerce Law by secret, and, therefore, illegal underbidding. The difficulty of enforcing that law is two-fold. (1) The temptations to violation are prodigious. (2) No one having any knowledge of a violation will disclose his knowledge, because all are either deeply interested to conceal it, or afraid to disclose it.

The agreement is likely to be very efficient in its operation; for (1), It takes away the temptation to violate the law; (2) it binds the parties not to violate it, and mulcts them in a severe penalty if they do violate it, and (3) it makes it the interest of all, except the guilty parties, to detect and expose any violation, and thus bring it to punishment.

In its first Annual Report the Commission thus speaks:

" The Act to Regulate Commerce is perhaps most
" often disregarded in the giving of rebates or the
" granting of special rates for the transportation of
" property of large shippers. The rivals of a car-
" rier who does this are likely to have at least such
" proof as convinces them of the fact, even when they
" do not possess positive legal evidence, and very
" often they have such proof as would be convincing

" if presented in Court. Low rates affect market " values, and if one dealer is found regularly dispos- " ing of market products below what others can " afford, the presumption that he is enabled to do " this through being given special favors in trans- " portation may lead to an investigation by the par- " ties concerned, which puts the fact beyond ques- " tion. It might be inferred that in such a case the " carrier whose business was injuriously affected " by the cut in rates, or by some rebate equivalent " thereto allowed by its rival would be ready and " anxious to place the facts immediately before the " public authorities with a view to prosecution, " and would do all in its power to bring the offender " to justice. Its interest, it might be thought, " would be sufficient to impel it to this course of " action. Such, however, is found not to be the " case. A carrier injured is much more likely to " resort to retaliation in kind than to assist in " prosecution; and the Commission has found it " practically impossible to obtain the assistance " of one carrier in bringing another to justice for " such misconduct. The reasons for the unwill- " ingness to give aid in such cases are not com- " monly avowed, but some of them may, without " much likelihood of error, be conjectured. It is " probable that very few carriers feel themselves " entirely secure in the matter of the observance of " the law, and for that reason, if for no other, they " may not be disposed to challenge their rivals " to a contest in the courts with the penal provisions " in view. But if this were otherwise the appear- " ance of a carrier as prosecutor of another, or as " standing behind the prosecution to furnish the " means of conviction, is well understood to be " likely to incite against it the ill-will of some por- " tion, at least, of the business community, and " thereby affect unfavorably their disposition to " patronize it. This is especially the case when

" the prosecution is instituted for the giving of low " rates, for, even when this is done unjustly and " illegally, it, nevertheless, will have, or seem to " have, the effect of favoring localities or impor- " tant interests, and thereby it secures their ap- " proval and invites their support. A carrier who, " under such circumstances, prosecutes, or who " aids a prosecution, does so at the risk, not merely " of submitting itself to such annoyances and ex- " pense as commonly attend a criminal proceeding, " but also of appearing in the eyes of an influen- " tial portion of those for whose favor all are com- " peting, as the prosecutors of a rival whose real " offense, whatever it may be nominally, consists " in the fact that in the struggle for business it has " been the more successful of the two, and for the " commendable reason, if lawfully done, that it has " conceded more to the demands of competition and " been less severe in its exactions. The risk of arous- " ing against themselves a prejudice of this nature is " one which the experience of the Commission shows " the carriers are very slow to encounter. It might, " and probably would be otherwise, if they had reason " to believe that the prosecution of delinquents could " be carried on with the hearty and undivided support " of the business community which ought to be given " it.

" The feeling among the managers of roads on this " subject is very well shown by an extract from a " letter of a general manager of one of the roads ter- " minating in Chicago, who, in response to a letter " from the Commission upon this subject, writes as " follows:

" ' Referring to your complaint against railroad " ' officials that they admit, state and charge that the " ' published rates are cut in violation of law, while " ' at the same time they fail and refuse to give any " ' evidence to the Commission, I beg to say it is true " ' that we do make such charges and have informa-

" 'tion about such cut rates that warrants us in mak-
" 'ing them, still we dare not use it with the Com-
" 'mission or in Court. The transportation of this
" 'country is handled by a comparatively small num-
" 'ber of persons who are all interested in getting
" 'the lowest rates possible and the greatest advan-
" 'tage over their competitors. These shippers we
" 'must depend upon for business, and if any railroad
" 'company or any railroad officials should go into
" 'Court or before the Commission with charges that
" 'such shippers are receiving favors from other rail-
" 'road companies, it would result in that railroad
" 'company or the company represented by such
" 'officials, being boycotted by the majority of the
" 'shippers. In other words, they do not want the
" 'law enforced so long as they get an advantage in
" 'its violation. The . . . . . Railroad
" 'Company and its officers desire that the Inter-state
" 'Commerce Law be enforced, but for reasons above
" 'given we dare not use the information we receive
" 'in various ways as to what is being done by our
" 'competitors and connections. Of course, this in-
" 'formation is not in the nature of absolute proof,
" 'but it is in the nature of prices paid for commodi-
" 'ties and the direction that traffic takes, which is
" 'not its natural channel. In some cases shippers
" 'state frankly that they are getting concessions,
" 'but of course do not divulge just how much, nor
" 'how it is done, and even were we disposed to use
" 'the information we get. I do not know that it
" 'would be competent evidence.'

" If carriers will not assist in prosecuting their rivals,
" still less is it to be expected that they will volun-
" tarily furnish evidence against themselves when the
" acts with which they are accused are criminal in
" their nature. They claim that the law itself excuses
" the citizen from furnishing evidence of criminal
" misconduct against himself, and that as officers, as
" well as the agents, who are actors in illegal trans-
" actions, are generally so circumstanced that if called
" into Court to give evidence they would be excused
" from testifying, they must be expected to decline
" to testify, or even to furnish desired information,

" when asked for the facts out of Court. The proof, " therefore, upon which convictions must be based " must, in most cases, come from parties not engaged " in railroad service, since the persons who have been " favored by discrimination or by illegal conduct are " not likely to give the facts to the public. The " difficulty of obtaining direct evidence from parties " who, by means of participation in the acts, have " such knowledge of the particulars of the illegal " transactions as to be able to testify to them, is " invariably very great, and circumstantial evidence " must, in many cases, constitute the chief reliance. " But circumstantial evidence, though it may be suffi- " cient to show the illegal conduct of the carrier to a " moral certainty, may yet fall short of such legal " proof as will insure conviction of any agent or " officer" (Vol. 3, Inter-state Com. Rep., pp. 339, 340).

These deliberate and solemn declarations of the body constituted by Congress itself to supervise the conditions of interstate commerce and the action of the various railroad systems in respect thereto cannot be too attentively perused and reflected upon by any one who feels it important to gain a knowledge of the *actual effect* of the agreement in question, and whether it is calculated to *restrain*, or to *promote*, the trade and commerce of the country. They prove every material assertion made in this brief of the unmeasured mischiefs of unfair competition in rates and of the inability of repressing them in any other way than by the making and observance of such agreements.

They show in the clearest manner that railroad business, when left, as it is with us, to be carried on by private agencies, and subjected to the stress of free competition, will develop prodigious mischiefs

both to itself and to the public; and that in the natural course of evolution a system of regulation will, step by step, be framed, partly by law and partly by the voluntary action of those engaged in it, calculated to do away with such mischiefs. They show that complete regulation by law is neither possible nor desirable; that the necessary regulation of great industries conducted by private individuals is in most respects better worked out by private agencies, but whether worked out by law, or by private agency, it is the same in effect, and no more a restraint upon trade or commerce in the one case than in the other.

This private regulation is found in every large industry, and is indeed one of the most characteristic of the *phenomena* of modern civilized society. Some instances may be profitably referred to.

a. Trade unions among laborers are of this nature. Laborers form associations for their own good. They adopt rules governing the action of their members, including the rates of wages for which they will work. Such organizations may sometimes be perverted to evil purposes, but there are few who doubt that, on the whole, they are of great benefit to the class of laborers, and have greatly contributed to raise that class to their present more comfortable position. They have the effect of securing to the class a larger share of the fruits of labor then it would otherwise gain. It makes their labor more effective and productive, and increases, rather than diminishes, the productiveness of the whole community.

They go infinitely further in restraint of competition than the agreement under attack; that restrains competition for a few days only, and for the purpose only of compelling competition to be fair, legal and open· but the labor unions embrace provisions absolutely and permanently fixing prices and binding their

members not to work for less prices, and also not to work except upon many other conditions. If a restraint upon *competition* were a restraint upon *trade*, how could any of the labor unions be defended? But would any one say that if there were a State statute condemning contracts and combinations in restraint of trade generally in the same terms as those employed in the Anti-Trust Act in relation to inter-State trade, the labor union agreements would be held illegal under it? And yet the main object of these unions is to do away with competition. The ground upon which they are best defended is that by combination they enable laborers to command higher wages, and thus a larger share of the comforts of life. Formerly this was thought to be against public policy, as being injurious to trade; but more reasonable views have succeeded, and the universal belief at present is that they greatly increase the efficiency of labor, lead to a more just distribution of the products of industry, and the courts of England and America are united upon the doctrine that such unions, when they contemplate alone the benefit of their own members, and are without malice or design to injure others, are not obnoxious to sound public policy, but promotive of it.

b. Associations of employers are rendered necessary as a counter-poise to those of laborers. These also deal directly with prices, and preclude the members from paying more than the rates agreed upon. The combined action of these two private agencies rescues the rates of wages from the dominion of the weakness, or the necessities of individuals, tends to put all upon the same basis, leads to the conference and conciliation, and allows the great law of supply and demand to have more complete play. But what can save such organizations as these from

the charge of illegality if this joint traffic agreement is held illegal?

c. The numerous Commercial, and Stock and Produce Exchanges, and Boards of Trade are illustrations of the same necessity and utility of organizations created by agreement. It is a feature of most of them, probably of all of them, that they fix the charges or commissions which their members may exact for their services to their customers, and thus maintain rates, not temporarily and incidentally, as is the case with the agreement in question, but absolutely; but this is necessary in order to take away the temptation to secret and dishonest practices which would demoralize the business thus regulated and lead men to avoid employing those engaged in it. The courts of New York have more than once expressed their sense of the usefulness of the New York Stock Exchange in promoting order, regularity and integrity in the transaction of an immense body of business. That exchange has existed for a century, and the London Stock Exchange for a still longer period; but who has ever heard it charged that they operated as a restraint on the trade with which they are concerned? Everyone knows that they have prodigiously promoted and increased it; and such has been the effect of the other similar institutions referred to.

A just sense of consistency has compelled an attack by the Department of Justice upon these very organizations as being violations of the Anti-Trust Act, and a case of this description (United States *vs.* Kansas City Live Stock Exchange) is now on the docket of this Court in which a very able brief has been filed, showing the necessary part which such institutions play in the commercial life of the world and how necessary they are to the promotion of trade and commerce.

d. We recur to the illustration suggested at an earlier place in this brief of the condition of an unregulated hack service at the railroad stations in a large city, amounting almost to a public nuisance, and actually deterring passengers from availing themselves of the service, although greatly desiring it. A municipal ordinance, well devised and enforced, would render the service a very acceptable one and prodigiously increase the demand for it. In the absence of such an ordinance a voluntary association of the drivers enforcing upon themselves the same rules would have the same effect and increase the traffic in a like degree. Would an agreement for such an association be properly designated a contract in restraint of trade? And yet it would contain the substance of the very provisions in the Joint Traffic Association agreement to which exception is taken. It would fix the fares, and provide supervising agents who should assign the business fairly among the members.

Trade, or commerce, for the two words are evidently used as synonymous in the act, is the *interchange of commodities*. Transportation is not such interchange, but one of its incidents or instrumentalities; and while the effect of the agreement upon this incident or instrumentality is direct, its effect upon commerce is *indirect*. A regulation of transportation *might*, indeed, be such as to operate as a restraint upon commerce; but it may have, on the contrary, the effect to greatly promote and increase commerce. Whether it have the one, or the other, is a question of fact the solution of which is to be found in an inquiry into the nature of its provisions and their probable effect, as shown by experience.

Agreements in all fundamental respects similar to the one in question have been in force during the whole history of railroad competition, and in some instances going much further in doing away with competition by actually pooling traffic, or its receipts, but will any one say that *commerce*, the interchange of

commodities, has been thereby *restrained*, that there has been *less of buying and selling* by reason of them? Every one must admit that trade and commerce have been prodigiously facilitated by them, and consequently, increased.

Nor has this regulation by agreement in any instance operated to increase rates. During the whole period there has been a constant decrease in charges, almost without interruption, the decline being from about three cents per ton per mile to one-half of one per cent.; and the decline continued during the period of pooling agreements, and also since the present agreement has been in force.

What then is the ground which makes courts hesitate (for they do hesitate) in coming to a conclusion upon the point whether the statute is applicable to such agreements? What are the possible apprehensions that such agreements may have the effect of restraints upon commerce? They are all embraced in one; the apprehension of *monopoly*. It *seems* to some that if the competing railroad systems were actually able to enter into agreements upon rates, they would have the *power* to fix them at any point which they might think fit, and that the temptation to put them at a high figure would be irresistible. This fear is wholly groundless, finding no support either in reason or experience.

We have not heretofore asserted, and shall not now assert, that there is any error in imputing to owners of railroads an obedience to the universal motive of self-interest; and we fully admit that if they had the power, they would put rates at a high figure, if thereby they could make a larger aggregate profit, so as to be able to make larger dividends on the capital invested; but the question is—What action does self-interest counsel? Those who think it advises high prices are under several capital errors. They think that both the demand and supply of transportation are fixed amounts, or approximately so, and consequently that the profits

must increase with the prices. This is the result where the supposed conditions exist. The man who happens to own a single case of boots in a distant settlement can, and will, exact a price ten fold greater than their value at the place of manufacture; but even his price will be regulated by the demand. He may charge fifty, but will not a hundred, dollars. If there were a patent on bicycles the makers would not charge a thousand dollars for one, but would measure the exaction according to the demand, so as to secure, in the aggregate, the largest profit, and to this end they would consider the pecuniary ability of purchasers. Wherever larger sales, made possible by a diminished price, will bring a larger aggregate profit, the price will be diminished. In relation to things which are dealt in on a small scale the most profitable course often is to impose larger prices, for the increase of the demand, consequent upon the diminishing of the price, does not compensate for the diminution of the profit on particular sales. A lessening of the price of medicines may not largely increase the demand; but the result would be quite different in the case of beef, or sugar. The enormous export of a certain inferior quality of refined petroleum oil from this country to ports east of the Cape of Good Hope is made possible only by an extremely small profit on each gallon; but the aggregate return is very large. The raising of prices, when operating on a large scale, is so much more potent to reduce profits by reducing the demand, that self-interest will seldom counsel it.

Another source of error with those who feel apprehensions of monopoly in transportation is the failure to notice the circumstance, already adverted to, that transportation is a *mere service incidental to other business*, and depends for its amount upon the amount of other business. The railroads are, therefore, absolutely united in interest with the business of the regions which they serve, and are affected by all the competitions of such business. The manufacturers

of cotton goods in the North are in competition with those in the South: and this competition forces low rates. Moreover, nations themselves are in intense competition with each other, and all the railroad systems participate in it. A slight increase even in the rates upon wheat from the West to the seaboard would immediately prevent the export of a bushel, and the whole traffic be lost to the railroads.

The business of a great organization like the Joint Traffic Association in respect to rates is not confined, therefore, to conferences and arrangements between the railroads themselves, but includes the great manufacturing and producing interests. It is the representations concerning the necessities to which these interests are subjected, sometimes made to particular railroads and thence transmitted to the Board of Managers of the Association, and sometimes made directly to the latter, which constitute the main study of that Board. It is the great central agency, open alike to the railroads and the rest of the business community, for the adjustment and settlement of problems upon which the successful conduct of all branches of business in large measure depends.

It is impossible to assign too much importance to the considerations last above suggested. How can the multiplied and complicated competitions of a nation like ours be left to stand or fall upon their own merits, if involved in other competitions with which they have no proper concern? A manufacture may be started in one district based upon sound calculations as to ability to compete with others in other districts. Such calculations necessarily assume rates of transportation as they exist in the several districts. A fierce competition between railroads in one district may so lower the rates there as to make it impossible for a rival in another to continue in business, and the latter is consequently made the victim of a competition to which he is not a party and concerning which he could make no calculation. If there were an organization be-

tween all the railroads to which proposed changes in rates were to be submitted for approval, the manufacturers in each, either in person or through the roads doing their business, would be heard, and the destruction would be prevented. If the ownership and operation of railroads were in the hands of the state, no changes destructive of business establishments built up upon the faith of existing rates would be allowed. Is it possible that a regulative power so necessary should be denied when the control of transportation is lodged with private owners?

Nor should the necessary tendency of large railroad organizations to govern their action by the great principles of justice and general convenience be overlooked. This tendency does not proceed from disposition, but from necessity. It is simply impossible for the governing and administrative bodies in control of the great mass of the railroad transportation of a vast region to regulate their action upon any other principles. They must necessarily regard the welfare of *all* their members. They would fall to pieces at once if any partiality were practiced; and the interests of the whole are so inseparably connected with the convenience and prosperity of the public which is served, and from which all the profit must be derived, that justice and fairness to all interests must necessarily become the rule of action.

What has been said is sufficient to show that the apprehensions of monopoly and oppression with which we are dealing have no foundation in *reason*. They have as little in experience. Complaints there doubtless have been in unprosperous times that railroad charges absorb the margin of profit made by those who think that railroads ought to carry, under all cir-

cumstances, at rates which will permit a profit to the producer or manufacturer; but it is believed that no instance can be found of the imposition of plainly exorbitant charges by any railroad, or combination of railroads. This is not for the reason that they are not governed by selfish motives, but because selfishness does not countenance such a policy. And yet it is true that the rates of competing railroads have in general been practically fixed by agreement for most of the time since competition began. The intervening periods when this was not true have been intervals of deadly and ruinous competition — rate wars — speedily terminated by peace, as such wars always must terminate, unless there is some law compelling a continuance of strife to the bitter end. Secret departures from the agreements have, to a greater or less degree, prevailed under the pressure of temptation, and have continually threatened the peace; but the dread of deadly hostilities has, in general, served to induce some, although very insufficient, measure of fidelity.

Were the apprehensions of monopoly and oppression in any degree well founded, it is impossible that there should not have been a general keeping up of rates and occasional periods of excessive charges; but the history of rates in this country during the last twenty-five years shows a uniform and steady decline from about three cents per ton per mile to about one half a cent, and the rate is at the present moment lower than at any former period and very much lower than in any other country.

It may be suggested that, although the foregoing argument and observations concerning the beneficial operation of agreements as to rates may be well founded, yet that the business in hand is the interpretation of an Act of Congress, and that we cannot be assured that Congress was persuaded of the wisdom of these views; that, on the other hand, the erroneous prejudices entertained by large numbers of the people

may have prompted the legislation; that courts cannot correct the errors of legislators, and that the only relief may be in an appeal to Congress.

This is the view which underlies the opinion of the Court in the Trans-Missouri case, as already explained, and it was very pertinent there. If the appeal now made to the court were to *read into* the statute words not found in it on the ground that, otherwise, unsound views, in their tendency destructive of a great interest, would be imputed to Congress, it might fairly be answered that, in order to justify such an interpretation, it must be shown, not only that the views were unsound, but that they were not actually held by any considerable number, and that therefore Congress could not be supposed to entertain them. But no appeal is now made to have anything read into the statute. The present argument is based upon the assumption that the statute must be taken to mean exactly what its words naturally import. But, taking it in that sense, Congress has prohibited such contracts, and such only, as *do restrain trade or commerce* and the real question is whether the Joint Traffic Association agreement does, *in fact*, restrain trade or commerce. Unless the foregoing argument is utterly erroneous this question must be answered in the negative. To say that the agreement does not, *in fact*, restrain commerce; but yet that Congress when it enacted the statute erroneously believed that such agreements did impose such restraint would be adopting a frightful rule of interpretation. *It would be imputing to Congress an erroneous belief without any support from the language employed; and this for the purpose of enlarging the meaning of a criminal statute and subjecting to punishment conduct which cannot properly be regarded otherwise than as praiseworthy!* The duties of Congress certainly do not belong to this court; and as little can the duties of this court be devolved upon Congress. If, in case of an unfavorable decision by this court, an appeal for relief should

be made to Congress, that body might well ask, "If this contract does not, *in fact*, restrain commerce, how came the court to pronounce it illegal? By what warrant does that body impute to us an erroneous belief when we have employed no language which justifies the interpretation?"

V. Upon the foregoing statement of the growth of our railroad systems and of co-operation and agreement among its different members and of the real nature of the regulative Association organized by the agreement before the court, and its actual and intended effect upon trade and commerce, we repeat, though not in the same words, our main proposition, with the view of summarizing under it the leading inferences which that statement justifies. That proposition is *that the agreement which this action seeks to condemn is not, by reason of any restraint effected by it upon competition, or otherwise, a contract in restraint of trade or commerce but is, on the contrary, highly needful to, and promotive of, both.*

1. It is necessary to *stability* in rates. And what can be more important to merchant or manufacturer in making engagements or calculations for the future, than to know what rates of transportation he can rely upon?

2. It is necessary to *uniformity* in rates and to the prevention of *unjust discrimination*. This, more than anything else was the object of the Inter-state Commerce law; but, from the nature of the case, any law must be powerless to prevent, in any considerable degree, the giving of secret and unequal rates by a railroad when under the stress of deadly competition it becomes

necessary to give them in order to secure the traffic necessary to life. The event has fully confirmed this obvious truth. That law has not prevented and cannot prevent, ruinous competition, unless it is supplemented by agreement taking away the motive to engage in ruinous competition, and making it the interest of all, except the violators of the law, to have the violators detected, exposed and punished. The agreement converts the great body of the railroads into detective agencies.

3. It is necessary in order to fully secure the general benefits of harmonious co-operation, in classification, interchange of traffic, and other regulations designed to enable the enormous transportation business of the country to be transacted with order, ease, safety and despatch. No one questions the magnitude of these benefits; but they are all, either wholly or partially, sacrificed whenever a war of rates breaks out. How can arrangements predicated on harmony and co-operation be effectually carried out when war exists? And the sole purpose and effect of the agreement is to prevent war, if possible, and to limit and mitigate its evils where it is not possible to prevent it.

4. It is necessary as a supplement to the Interstate Commerce Act, and in order to make the objects of that act attainable. Uniformity in rates, stability in rates, and fair and just rates were the only objects of that enactment. We have mentioned the necessity of it to the first two of these. It is alike promotive of fair and just rates. Its efficacy in this direction will be further dealt with presently.

5. It is necessary for the *prevention of crime*, for its *punishment* when committed, and for the *prevention of perjury*. Competition between railroads, unless arrested at some point by agreement, must, as we have seen, necessarily become war, and such war can only be waged by the giving of secret and *unequal* rates. Whatever rates are necessary to secure traffic must be yielded, and this means a struggle by rival soliciting agents who can make themselves acceptable to their employers only by "getting there." The best bargain that can be made will be the only rule that will be followed, and inequality is the immediate and inevitable consequence, and to such a degree that there can be no pretence to equality. This means crime on the most gigantic scale, and concealment on the like scale. Every participant is involved in the crime, and concealment, and perjury in order to secure concealment, are the necessary attendants.

It is marvellous that any should imagine that such an enactment as the Inter-state Commerce law could be wise or just unless those called upon to obey it were permitted to adopt the only expedient which would enable them to obey it. To subject railroads to competition, liable at any moment to run into deadly war, from which it is impossible for them to retire, and which it is equally impossible for them to carry on without discrimination in rates, to make such discrimination in rates a crime, and then to declare that the only means by which the war can be avoided, and the consequent criminal discrimination avoided, to be in itself a crime, would be imputing to the legislature an inconsistancy and absurdity which nothing short of the most unequivocal language, plainly requiring it, would warrant.

6. All that Congress has prohibited is, so far as con-

tracts are concerned, "contracts in restraint of trade." What contracts are of this character is left to the Courts to determine. Unless the foregoing argument is wholly mistaken, the final question is: Is a contract between railroad companies, necessary to the uniformity, the stability, the fairness and the justness of rates, necessary to the ease, safety and convenient despatch of the enormous transportation of the country, necessary as a supplementary aid to the Interstate Commerce law, and in order to enable railroads to comply with its provisions, necessary to the prevention of crime, concealment and perjury, otherwise sure to be committed to a prodiguous extent, and necessary to the preservation of great public facilities, a contract, combination, or conspiracy in restraint of trade within the meaning of the Act?

VII. The views heretofore asserted concerning the interpretation and application of this statute in no degree tend to rob it of a legitimate and useful operation in accordance with sound views of public policy. It reaches and represses, within the limited scope of federal jurisdiction, every contract or combination designed to create a monopoly or restrain trade. Further than this no legislation should go.

1. So far as concerns contracts *directly* restraining trade, as where a man covenants not to carry on a trade *without a good consideration*, the statute is clearly effective, although the wisdom of applying the criminal law to such cases might well be doubted; for the instances in which such contracts are likely to be made, to the public injury, are so rare that severe repression is hardly called for.

In the cases where contracts are made upon good consideration, as where a man sells a business or good will, created by his industry, a covenant not to continue it is necessary in order to enable him to sell it. Such contracts are plainly not in *restraint* of trade; they *are trade itself*, and should receive, as they now do, the favor of the law.

2. In the case of unions among laborers embracing rules not to work for less than certain specified wages, although there is really an *appearance* of restraint, there is none in reality, at least where such unions are formed in good faith to promote what is honestly believed to be the good of the whole body. In such cases it soon becomes manifest that the wages cannot be raised above the rates which the general law of supply and demand allows; and to hold them at that point is a public good. It is the only mode open to the class of laborers to prevent advantage being taken of individual weakness.

Trade unions may sometimes be perverted to evil purposes; but, on the whole, their beneficial operation is admitted, and no sound policy would seek to suppress them on account of occasional mischief. These do not, in fact, restrain trade. They promote it by benefitting the laboring classes, making their labor more efficient, and making them *larger consumers*. Large consumption is the indispensable condition to large production.

Similar unions among employers, stand upon the same ground, and are a needed counter-poise to unions among laborers. They lead to conference and a friendly consideration, on a large scale, of what is for the good of both classes, and to a fixing of wages at juster rates than would otherwise be possible.

3. But wherever there is a *perversion* in either of the above cases of the power of union for the purpose of oppression, either of individuals or the public, the agreement or combination is in restraint of trade, and is prohibited by the statute. It may be suggested, indeed, that the discovery of the illegitimate purpose may be difficult; but if this were true, it would not matter. In such cases, at least, the law will not prohibit fair, honest and useful transactions from some apprehension that possible misdoing may escape punishment. But the discovery is not difficult, and juries need rather to be cautioned against finding an intent to repress without sufficient evidence.

4. So far as monopolies are concerned, the statute is equally effective. But it is needful to keep clearly in mind what a monopoly is. A great aggregation of wealth, whether held by one owner, or many together, under a corporate form or otherwise, cannot acquire, or create, a monopoly in anything which is not a natural monopoly, or one created by law. In things capable of being produced to an unlimited amount by the mere application of capital and labor there can be no monopoly, unless it is created by law. The grant of an exclusive right to make and import leather, or other similar commodities would indeed create a monopoly, and perhaps once did in England. The statute against monopolies put an end to such abuses by opening the business to competition, and little has been heard of monopolies in such things since.

An enormous aggregation of capital may indeed control, to a certain extent, and for a limited time, the production of a great staple, such for instance as sugar; but this is not, of necessity, a monopoly: it may be only the fair reward of the superior advantages which belong to a large capital and the

successful practice of economies in production. Small establishments could not compete with it, because they could not furnish the article at so low a rate; but, should the large establishment endeavor to raise the price to any considerable extent, the competition, at first overcome, would speedily show itself and compel a reduction. It may be said that the great sugar monarch is still enabled to make a considerably larger profit than is reaped in other industries, and this may be true; and for the reason that there is not temptation enough to bring together a similar aggregation of capital to make a contest with it. If this be an evil it is one created, not by combination, but by the action of the government in allowing a prohibitive duty; and if the duty were withdrawn, or even considerably diminished, the price would instantly come down. The prohibitive duty is, in itself, a monopoly to a certain extent, because it shuts out the competition of the world.

It is an inevitable consequence of prohibitive duties, by the temptation they afford of a large profit, to attract to the industries thus favored an undue amount of capital, and the result is, inasmuch as the surplus cannot be sold in foreign markets in competition with producers enjoying untaxed material, to produce a glut at home. Under such circumstances the home producers find themselves engaged in a ruinous competition and the natural and proper endeavor is, instead of quitting the business which, perhaps, they cannot do without heavy loss, to save themselves from it by agreement to limit production to a point so proportioned to the demand as to enable them to reap a living profit. Whatever advantages there may be in prohibitive duties, this is, undoubtedly, one of the disadvantages, and, inasmuch as it is one created by law, the law ought not, by prohibiting such agreements for safety, to make those difficulties, which it has itself created, as fatal as possible.

It is quite true that where there happens to be a

small number of producers in such an industry there is, when the profits are large, a temptation to so unite themselves by agreement as to maintain an *undue* price; but there are two causes which render such attempts, for the most part, temporary only and of comparatively little consequence. In the first place, as they are, and always were, illegal and uninforceable, the parties to them have nothing to rely upon except their own words, and, next, the temptation to sell more goods and for less than the agreed price is so great that it will be yielded to by some, and when this is suspected by the others, there is nothing to restrain the latter.

The case is quite different where the motive to the agreement is not to make a large profit, but to prevent the compulsion of selling at a ruinous loss. The case is that of over-production. There is no large profit to be made by a violation of the agreement, and the temptation to break it is much less, and the inducement to keep it much greater, for it is the only escape from ruin.

There is ordinarily no difficulty in distinguishing between the legitimate and the illegitimate agreements. One is entered into when the demand exceeds the supply and the profit is large; the other when the supply exceeds the demand, and the profit small, indeed, usually, none at all. In the latter case the motive is obvious, to save the parties from ruin; in the other equally obvious, to impose an exaction on the public. In the one case the parties are engaged in defence; in the other in attack. There is one simple and easy inquiry the answer to which will at once discriminate the cases. Does the demand exceed the supply so that all the combining parties might be profitably employed in satisfying it? or does the supply exceed the demand, so that if all continued to produce, the product would have to be sold at a loss?

The statute is perfectly adapted to reach the only

one of these two cases which it is sound public policy to disfavor.

5. But there are other monopolies, not created by law, but which are a gift of nature. The things embraced by them are not the product of industry, for, if they were, they could be indefinitely multiplied. They exist in respect to those treasures of the earth, the supply of which is limited, such as the product of most mines, anthracite coal, for instance. Sometimes the supply is so abundant, that the limit is of less consequence. Land itself is limited in supply, but in this country the supply is so large, except in crowded populations, that it has but few of the features of a monopoly.

Wherever a monopoly exists, especially in things of which there is a large demand in proportion to the supply, large profits may be reaped by the proprietors, and the whole may be owned by a single proprietor or company, and in such cases, it may exact such price as the demand permits. No law can control the conduct of owners in these particulars without trenching upon the constitutional rights of property. It is one of the things which make up the conception of property that the owner has absolute control over it, and may dictate the terms on which he will part with it. Possibly, in the case of necessaries of life, such terms might be exacted as would cause public suffering and justify the State in an exercise of the right of eminent domain; but such an instance has not yet occurred.

In these cases of limited supply there is a temptation for all the owners to combine and thus secure to themselves by executory agreement the same advantages which they would enjoy if absolute owners. Contracts and combinations of this character among the owners of a thing the supply of which is limited by

nature are clearly illegitimate. They have uniformly been so declared by the Courts, and this statute is adequate to reach and punish them. By actual sale a single ownership may be created, which the law cannot prevent.

The foregoing concludes our discussion on the principles of reason, of law, and of sound public economy of the question whether this agreement *restrains trade*. Unless the line of argument is very gravely erroneous, its just conclusions reach much beyond the establishment of the negative of that question, and demonstrate that the agreement is in the highest degree *promotive* of trade. But they reach much further still, and show that some agreement with similar aims and provisions is absolutely *indispensable* to trade.

A strong assurance is felt that this last conclusion will be accepted when the deliberate attention of the Court is given to the results which would follow if this agreement should be condemned as in violation of the Anti-Trust Law. Those results are declared in the next proposition, which is believed to be fully established by the considerations already adduced.

SIXTH POINT.

If the Anti-Trust Act is interpreted as forbidding agreements, such as the one under discussion, one of three alternatives must necessarily follow.

(1.) That all railroad transportation be abandoned; or,

(2.) The consolidation of all competing railroads under a single ownership, either governmental or private; or,

(3.) That all competing railroad business must be carried on in constant and daily violation of criminal law.

1. Of these alternatives neither the first or the second can be contemplated as possible. Railroad transportation cannot be abandoned, and no governmental ownership can, under present, or any probably near future conditions, be brought about. We have no sovereign government possessing the requisite powers.

2. It is the third alternative which must follow; and that it will follow will at once be seen by recurring to some facts and circumstances already set forth.

The Interstate Commerce Law requires every company to fix, file and publish its rates, and to strictly adhere to them by charging no more and no less than the rates published. It will be admitted that, in order to comply with these requirements, each company must have the *information* necessary to

enable it to *determine* what rates it will charge, and the *ability* to adhere to its rates *as determined*.

But what is the *information* which is necessary? A company may indeed form a notion as to what is a *reasonable* compensation for each particular service, but this is not enough, any more than in the case of the sale of goods by a merchant. He can sell no goods at any particular price provided his rivals are selling them at a lower price; nor will a competing railroad obtain any goods to be carried if a rival road carries them for less. What the railroad company needs to know, and about the only thing it needs to know, is what its rivals are going to charge, and the difficulty is at once encountered that there can be no *agreement* without a violation of law.

But it will be suggested that, although agreement is forbidden, the asking and answering of questions by one company of, and to, another is not forbidden; in short that *mutual conference* is not forbidden. True, these things are not forbidden, and, therefore, let us see what progress can be made in this innocent direction. The rate agent of one company will say, "I must learn of my rivals what rates they are going to fix," and he goes to one of them and asks for a conference on the subject saying that the law does not make *mere conference* criminal.

But the answer would be that conference would do no good, for neither could form an estimate even, unless the conference embraced *all* the rivals. A conference of all is, therefore, determined upon and had, and, after much discussion and change of estimate, it is found that the final declaration of each one is that it will file and publish certain specified rates. No agreement is, in form, made, but each party knows that all are impressed with the conviction that harmony of action is absolutely necessary. They act upon that conviction, and rates are filed and published accordingly, and expectations may, or may not, be disappointed. If not, all may be well. But what has

thus been done? *An agreement has been entered into*, whatever the parties might say about it. *Each adopts a line of action upon a well-grounded expectation, induced by the declarations of the others, that they will adopt a certain line of action;* and this is *contract;* and the proof that it is contract is that any failure by any one of the parties to act in the manner declared would be instantly stigmatized by the others as a *breach of faith;* and, if the offending party should say in defence of himself that he had never agreed, the declaration would properly be stigmatized as shameful, and as adding insult to injury.

If, however, the lack of writing or other form should lead a criminal court to say that the proof of contract was not sufficient, there could be no doubt of the complete proof of *combination and conspiracy*, which are punishable under the statute in the same manner and degree as contract.

It is immediately manifest that such conferences would amount to nothing unless there were a *tacit assurance* given by each to the other that all might confidently expect that the rates thus coincided in, and which each expressed an intention to file and publish, would be adhered to. And this, at once, conclusively stamps the conference as *combination and conspiracy*.

3. No intelligent men familiar with railroad business have ever supposed that it was possible for competing railroad transportation to be carried on permanently without a *uniformity in rates*, fixed either by express or tacit agreement. There may be intervals without such agreements, but they are intervals of hostility, which, unless superseded by treaty, will inevitably and speedily degenerate into deadly war. In England tacit agreement, supplemented by some pooling agreements, keeps the peace. The whole of the

continent is regulated by agreements which the nations confirm and supplement by treaties.

In this country the end has been accomplished, less perfectly indeed, by agreements, pooling or other, and the present agreement is one devised to bring about the desired end without a resort to pooling, that form having been prohibited.

4. The multitudinous expressions of the Interstate Commerce Commission, many of which have been hereinbefore cited, to the effect of the necessity of harmony and concert in the fixing of rates, in order to avoid ruinous war, all mean uniformity of rates by *agreement*, either express, or tacit. That competing railroads can transact their business without it has never occurred to this body.

5. This Court in its opinion in the Trans-Missouri case fully expresses, as we understand it, the necessity of an agreement of some sort between competing roads upon rates, it says (p. 338:) "It is only by the "exercise of good sense and the presence of a com- "mon interest that railroads without entering into any "affirmative agreement with regard thereto, will keep "within the limit of exacting a fair and reasonable "return for services rendered." This would seem to mean—must mean—that the competing roads should have conferences with the view of reaching uniformity in rates, but without attempting to make a binding and enforceable agreement. There is no other way that good sense, or the conviction of a common interest could manifest themselves. Neither of these qualities could prevent an immediate and deadly competition if no uniformity in rates existed. But we think it must have escaped the notice of the Court that

such conferences and understandings involve the same criminality as the most formal contract. What the law is aimed at is "restraint of trade," and it is immaterial whether this is effected by contract, combination or conspiracy. The agreement in question is supposed to restrain trade and therefore to violate the law, because it contains a restraint on *competition*. If this be a restraint of trade effected by *contract*, surely a conference, resulting in a tacit understanding by which the same result is reached, is a restraint by combination and conspiracy. To be sure, the *tacit understanding* would not be, in terms, enforceable; indeed it might be perfectly well understood that the parties to it did not *intend* to legally bind themselves, and, therefore, it would not be technically a *contract*. Being void, it would be a nullity. It is for this very reason that Congress made it also criminal to *combine* or *conspire* to do the thing a contract to do which was prohibited. It is the *restraint*, however brought about, which the legislation was aimed at. And we respectfully submit to the Court whether Congress can be taken to have intended to punish as a crime a formal *contract* to do a thing which it would be innocent and even praiseworthy to do by conference and tacit understanding.

There are some observations in the opinion connected with the extract above cited, which seem to us to disclose a misapprehension. It is said that "it is "a matter of common knowledge that agreements "as to rates have been continually made of late "years, and that complaints of each company in re- "gard to the violation of such agreements by its "rivals have been frequent and persistent. Rate "wars go on notwithstanding any agreement to the "contrary and the struggle for business among com- "peting roads keeps on and in the nature of things "will keep on, any alleged agreement to the contrary "notwithstanding." * * * * * * * "These "agreements have never been found really effectual

"for any extended period" (p. 338). If this were true to the extent supposed, of what advantage would "the exercise of good sense" and "the presence of a common interest" be? If men will not keep a formal agreement to do, or not to do certain things, are they likely to keep a tacit, informal, and unbinding understanding to do, or not to do, the same things any better?

But this failure to observe agreements has not been thus general. *In general* the agreements have been kept, or so far kept as to preserve the peace. The general condition has been the observance of uniform rates—peace, and not war. The latter has been the exception. It is the terrible consequences which flow from breaches of agreement and consequent war, which give emphasis to that condition, and not its permanency. These consequences have led to improved forms of agreement supposed to be more likely to be kept, and finally to that of pooling. The prohibition of that form has led to the present one. That this will permanently and faithfully be kept cannot be affirmed with certainty; but if it will not be, certainly no tacit understanding, however reached, will be.

It is the main feature of the present agreement that it gives what is called "good sense" a chance to play and to be effectual. The two reasons which have made it difficult to keep agreements (other than pooling ones) heretofore are, first, that when a weak road has found itself unable to maintain itself under the agreement, it was *compelled* to break it; second, that when even strong roads found, or suspected, that others were not keeping the agreement they would not observe it themselves. The present agreement adopts rates supposed to give all a living chance. It does not *attempt* to bind them to keep such rates. They may depart from them to any extent at pleasure. But the rates established represent the common judgment of what

is fair, and the weak roads know that war and ruin will be the result if they compel a strife by departing from the rates. And they are not *compelled* to depart from them. Another resource is provided. They may ask for concessions, and the reasonableness of the request will be fairly considered; if well founded, it will be granted; if not, it will be refused, and properly refused; for if a road cannot be run on terms which make some return on the capital invested in it possible it ought to be abandoned.

6. We may, therefore, ask with increased emphasis the question whether Congress intended in enacting the Anti-Trust act to condemn and make criminal as *restraints on trade* those regulating contracts and arrangements respecting railroad traffic which, in some form, are everywhere adopted, and without which it is impossible the business of railroads could be carried on in conformity with its own laws?

In the Case of Trinity Church *vs.* The United States (143 U. S., 457), the question was made whether the statute against the importation of alien labor under contract was applicable to a contract with a clergyman abroad to remove to this country and engage in his calling here. It was conceded that the contract was fully embraced by the terms of the act, but the Court declared that it was not within the letter or intent of the act, and not, therefore, affected by it. The ground was that Congress could not be supposed to have intended to repress a transaction so innocent, according to the universal understanding of men, and the decision was supported by an overwhelming array of authorities.

We do not ask the Court to go to such a length. We do not ask it to take *a case out of the terms* of a statute. Our point is whether Congress, by the term "restraint of trade," should be held to include

an agreement which not only promotes trade, but is necessary to it. We invoke the attention of the court to the whole line of argument in the case cited, and to all the authorities referred to in it as decisive of the present question.

SEVENTH POINT.

The positions taken in this brief are fully supported by the weight of authority.

I.—What we have been above discussing is the principles of public policy in respect to alleged restraints upon trade effected by agreements among those engaged in any particular industry. It would be idle to expect an entire concurrence with each other in the multitude of judicial decisions upon these questions. Upon no questions is there such a lack of thorough knowledge and intellectual grasp among lawyers and judges, or more of yielding to popular prejudice than upon questions of public policy.

But, notwithstanding this, the distinctions above taken run through the whole body of judicial decisions and are fully supported by the best authorities.

1. Where the agreement has been one between the owners of a commodity of which the supply was limited by nature, that is, the case of a natural monopoly, the agreement has been condemned.

2. Where it was between a few proprietors of pub-

lic grants in respect to which there was a practical monopoly, such as gas companies, and the attempt was to *limit the supply* by agreement on the part of some *not to do business*, the result has been the same.

3. Where it has been entered into by the proprietors or producers of an article the supply of which is not limited by nature, but with a *purpose* to control, as far as possible, the production in order to exact an *undue* price, the agreements have been generally condemned.

4. But where the element of gaining control for the purpose of exacting an undue price is eliminated, and the agreement appears to be for the purpose of escaping the loss consequent upon ruinous competition, where the supply exceeds the demand, it has been sustained.

5. Nowhere, it is believed, has any decision been pronounced in recent times that a restraint upon *competition* is, *as such*, and without reference to its objects or effects, a restraint upon, or injurious to, trade. On the contrary, those agreements which exercise this restraint upon the largest and most extensive scale, such as trade unions, have been declared, when formed, not for coercion upon others, but to save their members from the burden of excessive supply and consequent low wages, declared innocent, and even praiseworthy.

And agreements between railroad companies, especially, where the object appeared to be, as the pleadings admit in the present case, to save from the de-

struction consequent upon ruinous strife, have been vindicated by the ablest judges as useful and necessary.

In the case of Kellogg *v.* Larkin, 3 Pinney's Wis. Rep., 150, in a learned and elaborate opinion by Howe, Judge, it was said:

"If it be true, also, that competition is the life of trade, it may follow such premises, that he who relaxes competition commits an act injurious to trade; and not only so, but he commits an overt act of treason against the commonwealth. But I apprehend it is not true that competition is the life of trade. On the contrary, that maxim is the least reliable of the host that may be picked up in every market-place. It is, in fact, the shibboleth of mere gambling speculation, and is hardly entitled to take rank as an axiom in the jurisprudence of this country. I believe universal observation will attest that for the last quarter of a century, competition in trade has caused more individual distress, if not more public injury, than the want of competition.

Indeed, by reducing prices below, or raising them above values (as the nature of the trade prompted), competition has done more to monopolize trade, or to secure exclusive advantages in it, than has been done by contract. Rivalry in trade will destroy itself, and rival tradesmen seeking to remove each other, rarely resort to contract, unless they find it the cheapest mode of putting an end to the strife. And it seems to me not a little remarkable, that in the case of Stanton *v.* Allen, 5 Denio, 434, it should have been urged against the agreement, that its object was to exempt the standard of freights, etc., from the wholesome influence of rivalry and competition. For it is very certain that because of that very purpose, because they did not tend to protect the party against the influence of rivalry and competition, courts of law have upheld like agreements in partial restraint of trade, ever since the case of Mitchell *v.* Reynolds, *supra*, was decided."

In Perkins *v.* Lyman, 9 Mass., 522, the Court said:

"Instead of an injury to the public the community may receive benefit from such procedure, as it will go to prevent the trades being overdone and so becoming profitable to none."

Also, in the case of Leslie *v.* Lorillard, 110 N.Y., 519, Judge Gray said:

"I do not think that competition is invariably a public benefaction, for it may be carried on to such a degree as to be an evil."

Again, in People *a.* North River Sugar Refinery Company, 4 Ap. Cases, 674, when tried before Judge Barrett, at the Circuit, he said:

"Excessive competition may sometimes result in actual injury to the public, and competitive contracts to avert personal ruin may be perfectly reasonable. It is only when such contracts are publicly oppressive that they become unreasonable and are condemned as against public policy."

In the late case of the National Benefit Co. *v.* The Union Hospital Co., 46 Minn., on page 275, Judge Mitchell, speaking for the Supreme Court, says:

"And again, modern investigations have much modified the views of courts, as well as political economists, as to the effect of contracts intending to reduce the number of competitors in any particular line of business. Excessive competition is not now accepted as necessarily conducive to the public good. The fact is that the early common law doctrine in regard to contracts in restraint of trade largely grew out of the state of society and of business which has ceased to exist, and hence the doctrine has been much modified, as will be seen by comparison of the early English cases with modern decisions—both English and American."

The Supreme Court of New Hampshire in the case of Manchester, etc., R. R. Co. *v.* Concord R. R. Co., (20 Atl. Rep., 383) already referred to, discusses this doctrine of unregulated competition with so true an appreciation of its meaning, and its consequences, that we quote at some length from the opinion:

"While, without doubt, contracts which have a direct tendency to prevent a healthy competition are detrimental to the public, and consequently against public policy, it is equally free from doubt that when such contracts prevent an unhealthy competition, and yet furnish the public with adequate facilities at fixed and reasonable rates, they are beneficial, and in accord with sound principles of public policy. For the lessons of experience, as well as the deductions of reason, amply demonstrate that the public interest is not subserved by competition which reduces the rate of transportation below the standard of fair compensation; and the theory which formerly obtained that the public is benefited by unrestricted competition between railroads has been so emphatically disproved by the results which have generally followed its adoption in practice that the hope of any permanent relief from excessive rates through the competition of parallel or rival roads may, as a rule, be justly characterized as illusory and fallacious. Upon authority also, arrangements and contracts between competing railroads, by which unrestrained competition is prevented, do not contravene public policy. Hare *v.* Railroad Co., 2 Johns & H., 80, is directly in point. In that case a bill in chancery had been brought by a stockholder in the defendant company to annul an agreement between two railroad companies to divide the profit of the traffic in fixed proportions; and it was admitted there, as it is here, that the purpose of the agreement was to prevent competition. In dismissing the bill Vice-Chancellor Wood said (page 103): 'With regard to the argument against the validity of the agreement, I may clear the ground of one objection by saying that I see nothing in the alleged injury to the public arising from the prevention of competition. * * * It is a mistaken notion that the public is benefited by pitting two railway companies against each other till one is ruined, the result being at last to raise the fares to the highest possible standard.' So also, in 1 Redf.

R. R., sec. 146, par. 2, it is said: 'There is no principle of public policy which renders void a traffic arrangement between two lines of railway for the purpose of avoiding competition.' And Mr. Morawetz says in his admirable treatise on corporations: 'Public policy clearly does not demand that railroad companies operating competing lines shall engage in strife causing their financial ruin; and, so far as agreements among companies are designed to effect this result, their purpose is not injurious to the public, or illegal. Moreover, such agreements are positively beneficial to the public, so far as they prevent the fluctuation of rates and unjust discriminations among shippers, which invariably attend the unrestricted competition of rival companies. It is, therefore, impossible to support the proposition that all agreements among railroad companies which restrict competition are condemned by law. Some such agreements may be contrary to public policy, and unlawful; but if an agreement of this character is a reasonable business arrangement to protect the shareholders and creditors of the companies from loss, and does not cause unreasonably high charges, or violate any duty which the companies owe to the public, it should be sustained and enforced by the courts.' Mor. Corp. (2d Ed.) sec. 1,131. In the same section, in speaking of contracts in restraint of trade (to which many of the authorities, and much of the argument for the defendant relate) he says: 'Even if there were such a rule, as has been claimed, applicable to competition in trade, the principle and policy of the rule would not be applicable to traffic arrangements designed merely to prevent ruinous competition and 'wars' among railroad companies. The main objection which has been urged against combinations restraining competition in trade, namely, that such combinations tend to produce monopolies and cause extortion, has no application to combinations among railroad companies, for railroad companies are prohibited by law to charge more than reasonable rates. It should be observed also that competition among railroad companies has not the same safeguards as competition in trade. Persons will ordinarily do business only when they think they see a fair chance of profit; and if press of competition renders a particular trade unprofitable, those engaged in that trade will suspend or reduce their operations, and

apply their capital and labor to other uses, until a reasonable margin of profit has been reached. But the capital invested in the construction of a railroad cannot be withdrawn when competition renders the operation of the road unprofitable. A railroad is of no use except for railroad purposes, and if the operation of the road were stopped the capital invested in its construction would be wholly lost. Hence it is for the interest of a railroad company to operate its road, though the earnings are barely sufficient to pay the operating expenses. The ownership of the road may pass from the shareholders to the bondholders, and be of no benefit to the latter; but the struggle for traffic will continue so long as the means of paying operating expenses can be raised. Unrestricted competition will thus render the competitive traffic wholly unremunerative, and will cause the ultimate bankruptcy of the companies unless the portion of their traffic which is not the subject of competition can be made to bear the entire burden of the interest and fixed charges. The application of these principles to the plea under consideration is patent and decisive. The geographical location and relative resources of the two roads were such as to render it obvious that the plaintiff could not reasonably hope to successfully compete with its more powerful rival. The alternatives presented, it may safely be assumed, were combinations or ruinous competition. It accepted the former; and as the combination did not, so far as appears by the pleadings, raise the rate of transportation above the standard of fair compensation, or violate any duty that is owing to the public from roads which are non-competing, there is nothing averred in the plea which bars the right of the plaintiff to an accounting with the defendant. Numerous cases have been cited in behalf of the defendant in support of its proposition that the combination between the parties must be regarded as void at common law because against public policy. For want of time it is quite impossible to go through and comment upon these cases in detail, as has been done in the last brief for the plaintiff; but it is sufficient to say in general terms, as is there said, that they are cases of contract in restraint of mercantile business; or cases of contract which attempt to derogate from the right of eminent domain inherent

in the state; or cases of contracts between railroad companies were held contrary to public policy because one of the parties attempted to bind itself not to perform duties incident to the legal character of common carriers or public servants; or cases where contracts between railroad companies were held contrary to public policy because one of the parties agreed not to build or cease to operate a road which it was chartered to build or operate; or cases where contracts between railroad companies have been held illegal merely on the ground that they were ultra vires; in short, they do not establish a rule which fairly includes a case like the one at bar. The demurrer to the second plea is sustained."

Judge Cooley—at that time Chief Justice of the Supreme Court of Michigan—in an article in the Railway Review, April 26, 1884, on the subject of Traffic Pooling, says:

"It is a familiar principle in the law that contracts in general restraint of trade are void. Therefore if a man contracts with his rival in business that for any agreed consideration he will no longer pursue his customary calling within the state in which he resides, the promise is one he may keep at pleasure or break with impunity. The reasons are that such a contract if enforced would deprive the public of the benefits of competition, and at the same time impose restraints going far beyond what would be needful for protection to the party bargaining for them. But it was always agreed that competition, in so far as it operated injuriously to individuals, might with entire competency be limited by contract; and in a great variety of cases it has been held that a man may lawfully bargain to put an end to an injurious competition in his business in the locality where he carries it on, or that he may bargain to prevent the establishment in that locality of a competing business which he fears may be injurious. It is only when he exacts terms that go beyond giving him protection that the law holds his contract to be unreasonable, injurious to the public, and therefore illegal. The reader unfamiliar with the law reports will find many of the cases referred to in the note; and it will ap-

pear on an examination that in all them *the legality of bargaining to limit competition, when it is kept within the bounds of reasonable protection, is either assumed or expressly affirmed*"[1]

In the same article Judge COOLEY says :

"The principal danger to be guarded against is the cutting of rates. In the unregulated and unreasoning strife between railroad companies this cutting is not only carried on to an extent that is ruinous to the companies themselves, but it becomes a disturbing factor in all commerce, and it is perfectly correct for the railroad companies to say, as they do when defending pooling, that unjust discriminations are a necessary result. The sort of competition which is the 'life of trade' in a war of rates, incites every agent to make secretly and by every form of indirection such terms as will secure the business; it is inevitable that these shall be without uniformity, and that those who push the hardest and bargain most—which will generally be the large shippers—will be most favored. Low rates, when they can be depended upon for any considerable time, increase the prices of grain and other market commodities in the hands of producers; but they affect prices little, if at all, when it is uncertain from day to day and from hour to hour what they are to be, and consequently such benefits as come from the hostile cutting of rates are reaped principally by speculators and other large shippers. It is doubtful if the shipping interest ever receives benefits equivalent to the losses which the railroad interest suffers in a war of rates, and the benefits to the general public will seldom equal the incidental injuries. Nothing, therefore, can be plainer than the desirability that reasonable rates should be maintained with general

[1][Judge Cooley's Note]:

"The following cases are selected from the great number which recognize the principle, because the republication in the volumes here given is accompanied by valuable notes and references: *Mitchell* v. *Reynolds*, Smith's Leading Cases, 508; *Perkins* v. *Lyman*, 6 American Decisions, 158; *Pierce* v. *Fuller*, 5 American Decisions, 102; *Bowser* v. *Bliss*, 43 Am. Dec., 93; *Grundy* v. *Edwards*, 23 Am. Dec., 409; *Morgan* v. *Perhamus*, 38 Am. Reports, 607; *Pike* v. *Thomas*, 7 Am. Dec., 741; *Drill Company* v. *Morse*, 4 American Reports, 513; *Hyt* v. *Holly*, 12 American Reports, 390; *Hubbard* v. *Miller*, 15 American Reports, 158; *Cook* v. *Johnson*, 36 American Reports, 64.

uniformity, so that they may be calculated upon in the making of contracts and purchases, and so that small shippers as well as large, the man who merely sends his household goods as well as the speculator in grain and provisions, may have the benefit of them."

In another part of the article he says:

"Such a state of things can exist in no business from which a transfer of capital is possible; and the competition it creates instead of being 'the life of trade,' is as to this business destructive of the capital invested in it. It becomes a matter of necessity then, that the competition which is so likely to be destructive should be restrained within the limits which will admit of reasonable and reliable prosperity; and some common arrangement between the roads seems to be the only means yet found by which this can be accomplished."

In another portion of the article, Judge COOLEY points out what so many people forget—that there is a wide difference between capital invested in railway enterprises and capital invested in ordinary business pursuits. He says:

"In most kinds of business, competition easily and naturally regulates the extent to which a business shall be carried on; persons engage in it only when they think they see a reasonable opening for profit; they push the business with men and money when the promise of success is such as to warrant it, and when it is not, operations are reduced; some, perhaps, go out of the business, and capital seeks other investments. The merchant, when competition becomes too severe for him, may turn farmer or manufacturer; the manufacturer may change his line of production or temporarily reduce it; and these changes it is generally possible to make without serious loss. Very seldom the whole plant for one business will be useless for any other. The general results of competition will therefore be such that, while the public will have the benefits of low prices, a general equilibrium of demand and supply will be maintained without bringing disaster to individuals.

Much of this is as different as possible in the railway world. The investment for the purposes of a railroad is permanent, and is available to a single purpose. If it cannot be made available for the transportation of persons and property it is a wasted investment, as much so as if it had been cast into the sea. But when the construction of railroads is entirely unrestricted, there is always a tendency to build more than are needed, and more than can be made profitable. The reasons for this are numerous. Railroads are a great local convenience; every village wants one or more; and it is easy for plausible men, who see individual profit in their construction, to convince the local community that a road which will accommodate their local needs must be profitable. * * * Roads have thus in many cases been constructed at general expense in which a capitalist for the purpose of investment would put nothing. But roads are also built under an expectation, on the part of those who originate and push them, that in some way the originators will be enabled to make them available for their individual benefit, regardless of their real value; sometimes through holding the control and managing them; sometimes by forcing the owners of other roads to which they would be rivals to buy them."

6. But nowhere can there be found, it is believed, a decision that an agreement like the one in question, which does not even aim at any permanent restraint upon competition, but a mere temporary adhesion to prices for a period of thirty days, for the purpose of preventing dishonest and illegal competition, is in any sense a restraint upon trade, or injurious to it, or in any way obnoxious to legal condemnation.

A suggested distinction between agreements restraining competition between persons or corporations engaged in business of a public nature and those engaged in private business.

The opinion in the Trans-Missouri case suggests this distinction in the following language :

" It must also be remembered that railways are pub-
" lic corporations organized for public purposes,
" granted valuable franchises and privileges, among
" which the right to take the private property of the
" citizen *in invitum* is not the least (Cherokee Nation
" *vs.* Southern Kansas Railway Company, 135 U. S.
" 641-647) that many of them are the donees of large
" tracts of public lands and of gifts of money by
" municipal corporations, and that they all primarily
" owe duties to the public of a higher nature even
" than that of earning large dividends for their share-
" holders. The business which the railroads do is of
" a public nature, closely affecting almost all classes
" in the community—the farmer, the artisan, the
" manufacturer and the trader. It is of such a pub-
" lic nature that it may well be doubted, to say the
" least, whether any contract which imposes any re-
" straint upon its business would not be prejudicial to
" the public interest."

This suggestion of a distinction in the case of corporations engaged in what is called a public business which would render contracts void, which would be entirely valid, if made between natural persons, is supposed, in the opinion, to have a foundation not only in principle but in authority; and to show this, a passage is quoted from the case of Gibbs *vs.* Baltimore Gas Company, 130 U. S. 396-408. The passage quoted is as follows:

" The supplying of illuminating gas is a business

" of a public nature to meet a public necessity. It is " not a business like that of an ordinary corporation " engaged in the manufacture of articles that may be " furnished by individual effort. *New Orleans Gas* " *Co.* vs. *Louisiana Light Co.* 115 U. S. 650. *Louis-* " *ville Gas Company* vs. *Citizens' Gas Co.*, 115 U. S. " 683. *Shepard* vs. *Milwaukee Gas Co.*, 6 Wis. 539. " *Chicago Gas Light and Coke Co.* vs. *People's Gas* " *Light and Coke Company*, 121 Ill. 530. *St. Louis* " vs. *St. Louis Gas Co.*, 70 Missouri 69.

" Hence while it is justly urged that those rules " which say that a given contract is against public " policy, should not be arbitrarily extended so as to " interfere with the freedom of contract (*Printing, etc.*, " *Registering Co.* vs. *Samson*, L. R. 19 Eq. 462), yet in " the instance of business of such a character that it " presumably cannot be restrained to any extent " whatever without prejudice to the public interest, " courts decline to enforce or sustain contracts impos- " ing such restraint, however partial, because in con- " travention of public policy. This subject is much " considered and the authorities cited in *West Vir-* " *ginia Transportation Co.* vs. *Ohio River Pipe Line Co.*, " 22 W. Va. 600; *Chicago &c. Gas Co.* vs. *People's* " *Gas Co.*, 121 Ill. 530; *Western Union Telegraph* " *Co.* vs. *American Union Telegraph Co.*, 65 Ga. 160."

The opinion in the Trans-Missouri case proceeds to intimate that this was not the decisive ground for the decision in the Gibbs case, inasmuch as the agreement condemned in that case was absolutely prohibited by a special statute, and then explains the particular purpose for which the extract is made as follows:

" The above extract from the opinion of the " Court is made for the purpose of showing the differ- " ence which exists between a private and a public cor- " poration—that kind of a public corporation which,

"while doing business for remuneration, is yet so con-
"nected in interest with the public as to give a public
"character to its business—and it is seen that while in
"the absence of a statute prohibiting them, contracts
"of private individuals or corporations touching upon
"restraint in trade must be unreasonable in their nature
"to be held void, different considerations obtain in the
"case of public corporations like those of railroads
"where it well may be that any restraint on a business
"of that character as affecting its rates of transporta-
"tion must thereby be prejudicial to the public interest."

It is not very easy to understand the precise significance of these observations. Do they mean, what at first they seem to say that, at common law, there are rights of contracts which corporations engaged in public business are precluded from enjoying, which *individuals engaged in the same business* may yet freely enjoy? If they do mean this, the proposition seems entirely novel. No authority sanctioning such a doctrine is known to the undersigned, and none is referred to in the opinion.

It is true as stated in these observations that such corporations "owe duties to the public;" but what is meant by saying that they are "of a higher nature than that of earning large dividends for their shareholders"? Are these duties any greater, or other, than those of private individuals would be if the latter were engaged in the same business? If any duties or obligations are created by accepting grants of public franchises are they not duties arising upon *contract*, and fully performed by the furnishing of the public facilities which are afforded by the exercise of the franchise? Is the relation between the railroad companies and the public usually initiated by the efforts of the companies seeking to acquire the franchises, or by offers on the part of the public to bestow them? If the railroad companies owe duties to the public, does not the public also owe duties to them? Do they owe any duty to the public other than that

of operating the franchise bestowed upon them by furnishing the money needed for its exercise, and by carrying freight and passengers with comfort, safety and despatch and for a reasonable price? And if they perform this duty is it not the duty of the public to allow them the same liberty in the conduct of their business as private carriers engaged in the like business enjoy? And if the latter are at liberty to save themselves from the ruin which comes from unfair and destructive competition by agreements with each other, must this privilege be denied to those who, under corporate forms, have, at the public solicitation, accepted grants of public franchises and faithfully performed the conditions of the grants, and they be compelled to do business at a loss, or abandon the enormous sums they have invested? When the State intentionally subjected them to the stress of competition, certain to bring ruin unless it were avoided by an agreement which unincorporated individuals engaged in the same business were at perfect liberty to make, did it not come, in justice and fairness, under a duty to allow them the same means of safety?

It is true also that the business of the railroads closely affects "almost all classes in the community—the farmer, the artisan, the manufacturer and the trader"—but is it the right of these, or of any classes, that railroads should be condemned to a ruinous competition and be deprived of the only method by which they can escape it when these same classes have the privilege of employing not only this method of escape, but others beside? Nay, is it to the interest of any class in the community that another class should be condemned to do business under ruinous conditions from which all other classes are permitted to protect themselves; and, particularly, is it in the interest of any part of the public that every substantial requisite of a good and efficient railroad service should be sacrificed to the mere apprehension of a monopoly which both reason and experience declare unfounded? Are

the Inter-State Commerce Commissioners, the supervisors appointed by the Government itself to watch over, *in the interest of the whole public*, the business of inter-State transportation, wholly in error in the declarations over and over made by them, that competing railroads should, and ought, for the benefit of the public no less than for their own benefit, come into concerted arrangements as to rates?

It will be observed that the case of Gibbs *vs.* Baltimore Gas Co. (130 U. S. 396), furnishes no color of support to the view that any different rule is to be applied to the case of agreements between *corporations* engaged in business of a public nature from that which obtains in relation to agreements between *individuals* engaged in the like business.

But was anything said by Mr. Chief Justice Fuller which supports the suggestion that corporations engaged in so-called *public* business are precluded from making agreements which, not containing any *direct* restraint upon trade, do contain some restraint upon *competition*, though not greater than that which persons or corporations engaged in *ordinary* business might create by agreement? We cannot perceive that there is; indeed it is quite certain that there is not. The *restraints* of which the learned Chief Justice was speaking were not *indirect* restraints like those upon *competition* in business, but *direct* restraints upon *business itself*, such as the case before him presented an instance of. The agreement which was the subject of inquiry in that case was between gas companies in Baltimore, and contained a covenant on the part of one of them not to exercise, beyond a certain limit, its corporate powers. This was fatally objectionable on two grounds: first, there was statute of the state expressly forbidding it; and *second*, it was an abandonment, *pro tanto*, of the duties which the company owed to the public. It was to this last feature of this agreement that the passage cited by Mr. Justice Peckham related. The doctrine suggested was that while,

if the covenant had been entered into by a corporation engaged in *ordinary* business the question would be whether the *direct* restraint thus imposed upon the prosecution of its business by the company was such a reasonable restraint as, under the ordinary rule respecting direct restraints of trade, was allowable, yet a different question arose when it appeared that the company was chartered for a business of a public nature; that in such cases no abandonment of the corporate business should be permitted.

That these observations were not intended for the case of a mere *possible*, *indirect*, restraint arising from a check upon competition is manifest from the fact that the agreement contained a *pooling* provision *absolutely doing away with competition* between the parties; and the learned Chief Justice said nothing in condemnation of this, but eliminated it from the discussion, saying, "Nor are we called upon to pass upon the validity, generally, of pooling agreements" (p. 411).

Nor is there anything in the authorities referred to by the learned Chief Justice in any way favoring the notion that parties engaged in public business, whether natural persons or corporations, are precluded from entering into any agreements regulating competition which persons engaged in ordinary business may make. Indeed, the authorities were not referred to as sustaining any such view; but let the authorities themselves be examined on this point.

The first case referred to is West Virginia Trans. Co. *vs.* Ohio River Pipe Line Co. (22 West Va. 600). We there find a paragraph (p. 625) stating, in the same language as that employed by Mr. Chief Justice Fuller that "if there be any sort of business which, from its "peculiar character, can be restrained to no extent "whatever without prejudice to the public interests, "then the courts would be compelled to hold void "any contract imposing any restraint, however par-"tial," &c., &c. and it proceeds to say that rail-

roading and telegraphing are such business. But what sort of restraint was here spoken of? Was it the *indirect* restraint growing out of traffic agreements, regulating competition, and which may or may not operate as a real restraint upon trade? Far from it; the sole question in the case was concerning the validity of an agreement between an individual land owner and a Pipe Line Co., whereby the former covenanted to give *an exclusive privilege* to the latter to lay pipe lines under his land. Of course, if one land-owner could do this, all could do it, and a most serious restraint would be imposed on furnishing to the public these important facilities. It was this kind of *direct* restraint, arising from exclusive grants, to which the court alluded, and the validity of these alone was the question in the case. And the authorities upon which the court relied were those holding that a railroad company could not make a valid *exclusive* grant to a telegraph company to operate a telegraph along its tracks. Such grants, of course, cannot be made. They assume the privilege of directly creating *monopolies*. Private individuals cannot do this; it is the prerogative of the State alone.

The next authority cited in the opinion under notice is Chicago, &c. Gas Co. *vs.* People's Gas Co. (121 Ill., 530). The question turned upon the validity of an agreement by which the gas companies sold out their establishments and covenanted not to exercise their corporate powers and duties for the space of one hundred years. Now, whether an ordinary manufacturing company could enter into such an agreement or not, no one will doubt that a gas company chartered to transact a business of a public nature cannot disable itself from the exercise of its powers, and such was the decision; and here we find the West Virginia case referred to, and the very language employed in that case quoted. Of course it meant the same thing, and the same thing only. It seems that Mr. Chief Justice Fuller, then at the bar, was of counsel in that case, and it seems clear that this was the doctrine

which he had in mind when he repeated the same language in Gibbs *vs.* Baltimore Gas Co.

The other authority referred to by him is Western Union Telegraph Co. *vs.* American Union Telegraph Co. (65 Ga. 160). The case turned upon the validity of contracts by certain railroad companies giving *exclusive* rights to the Western Union to use their tracks for telegraphic purposes. The Court, without touching upon the question whether any restraints upon business of a public nature were allowable, simply held that these were attempts to convert property already condemned to *public* use to the creation of a *private monopoly* in the furnishing of a public facility.

It will be seen, therefore, that the suggested distinction between persons engaged in business of a public nature and those engaged in ordinary business which forbids the former, and permits the latter, to into agreements which may restrain *competition merely*, has no support in the authorities referred to; but if it be taken, as it should be, in connection with the real facts of the case, it simply means that public business, like furnishing gas, shall not be *directly* hindered and restrained either by corporations chartered to carry it on agreeing not to exercise their corporate powers, or by attempts on the part of owners or possessors of land necessary to such business attempting to make *exclusive grants* of privileges to carry it on, and thus to create monopolies in the public facilities necessary to the business of life—a a sound doctrine, supported both by reason and authority.

In all probability it was in the latter sense only that the language was employed, and this is inferable from the expressions which follow it, in which it is said (p. 410): "Innumerable cases, however, might be "cited to sustain the proposition that combinations "among those engaged in business impressed with a "public, or *quasi* public character, which are mani- "festly prejudicial to the public interest, cannot be "upheld."

To the doctrine as thus stated we take no exception. It makes the validity of the contract dependent upon its actual effect upon the public interest. What we contend for is that agreements among parties engaged in such business which impose no *direct* restriction upon trade, which contemplate that all parties to the agreement are to continue to do their business, and as much as they can, but seek to prevent abuses in it, and to regulate, but not to destroy, competition, are not to be *deemed* prejudicial to the public interest, and invalid for the reason that the parties are engaged in a business of a public nature. It is only against the doctrine that the inquiry as to the *actual effect* of such agreements is not *open* that we contend. What we respectfully submit is that in such, as in all other occupations, private regulation by agreement *may be*, in the highest degree *promotive* of trade, and *promotive* of the *public* interest, and, when so, cannot be included within the class of contracts made criminal by the Anti-Trust Act as being in restraint of trade. Mr. Chief Justice Fuller could not have intended anything contrary to this, for he proceeds to state: "Nor are we called upon to pass upon the validity generally of pooling agreements." Now, if any agreement imposing a "partial restraint" precluded inquiry into its *actual effect*, a pooling agreement certainly would.

The reference, therefore, in the opinion in the Trans-Missouri case to the language employed by Mr. Chief Justice Fuller in Gibbs *vs.* Baltimore Gas Co. if intended to support any view to the effect that persons, whether natural or artificial, engaged in business of a public nature could make no agreements with each other containing any restraints, direct or indirect, seems not to the purpose.

But we are not content to leave the subject here. We desire to make it clear and undisputable, as a matter of authority, that this question whether agreements between such persons are injurious to trade de-

pends always upon the *actual effect* of such agreements upon trade, such effect being determined by the character of the agreements and the purpose in view as shown by the agreements themselves, and *the facts* of the situation which called them forth and to which they were to be applied.

The State of New York by its Revised Statutes of 1830, in formulating the law of conspiracy, made a conspiracy to do any act "injurious to trade or commerce" a misdemeanor. This was precisely the same *kind* of legislation as the Anti-Trust Act of Congress; and the question upon any indictment would be one concerning the *actual effect* of any act charged as a crime, namely, is it or is it not, "injurious to trade or commerce?" just as in the case of the Federal Statute the question is whether it is or is not in restraint of trade or commerce between the States. This is necessarily a question of fact, although, doubtless, in some cases the provisions of the contract, if there were a *direct restraint*, such as an agreement by some railroad not to carry goods except for a price admitted to be exorbitant, would of themselves be conclusive of the injury or restraint, and, therefore, require a decision condemning the agreement without other evidence. But, in other cases, other facts would have to be looked to, such as the circumstances under which the agreement was made and the probable purpose of the parties.

In the case of the People *vs.* Fisher (14 Wend. 9), an agreement between journeymen shoemakers not to work for less than certain wages was charged as an unlawful conspiracy under this statute, and the question whether it was so was treated as depending upon the *actual effect* of such an agreement upon trade or commerce, and the judgment was that such effect was injurious. This conclusion was probably erroneous. It would not now be followed; but what we cite the case for, is to show that in a case of a similar statute to the one under

inquiry, the question was treated by the court as one concerning the actual effect of the agreement. It was not, however, the case of a business of a public nature.

In the case of Hooker *vs.* Vandewater (4 Den. 347), the question arose in respect to an agreement between parties engaged in business of that character. The owners of several lines of canal boats united together in an agreement of a pooling nature. They agreed "*to stock*" all their earnings and divide them in certain designated shares among the parties, and "to establish rates of freight and passage to "govern the association, which rates so established "shall be signed by the parties in interest, and be "conclusive." There was no agreement that the prices should be fair or reasonable, nor any provision designed to make them so, and competition was absolutely suppressed during the whole period of the agreement, and not merely for a few days in order to give parties notice of a change in rates and enable them to compete fairly. The agreement contained a recital that it was "for the purpose of establishing and main-"taining fair and uniform rates of freight, and equal-"izing business among themselves, and to avoid all "unnecessary expense in doing the same." The action was brought to enforce the payment of a sum due under the contract, and the defence was that the contract was in violation of the statute. The court treated the question as one concerning the *actual and intended effect* of the agreement upon trade and commerce, and held it was in violation of the statute. It did not intimate that if the agreement had been one really designed to regulate the business and do away with ruinous competition, it would have been injurious to trade or commerce. On the contrary, it declared that "the object of the agreement, as expressed in the written contract was plausible enough; but it is impossible to conceal the real intention." This case is very pertinent in two respects: (1) It shows that in the case of just such a statute as the Anti-

Trust Act, the true inquiry is as to the actual effect of the contract, and that this involves the question of the purpose of the parties; (2) But it goes further and shows that such an agreement as ours would have been held entirely innocent. Let it be supposed that in this case it had appeared that the parties had been suffering from a *secret and illegal* competition, carried on by a violation of law, and that the agreement they made did not seek to prevent competition, but contemplated and provided for it, by requiring that all parties proposing to compete by a change of rates, should first comply with the law requiring the rates to be published, and should give notice of their intention to the others, so that all should start fairly, there can be no doubt that the court would have upheld the agreement?

Soon after another case upon a similar canal boat agreement arose upon the same statute, (Stanton *v.* Allen; 5 Den. 434.) The objection was now made that the agreement was illegal at common law as well as a violation of the statute, and so the court held; but the question was decided in the same way, as one turning upon the actual and intended effect of the contract. Had its provisions been so shaped as to make it appear that the parties had in view, not a monopoly by a suppression of competition, but simply security from ruinous and illegal competition, it is certain that the court would have upheld the agreement. It said: "Its (the agreement's) professed ob- "ject and purpose was the establishment of fair and "uniform rates of freight, and to equalize the busi- "ness among themselves. These rates were to be "determined by a committee and to extend to the "transportation of both passengers and freight. "While the introductory terms of the agreement pro- "posed nothing apparently objectionable, the ulti- "mate object is very manifest, and is of a different "character." This learned court perceived no objec-

tion to an agreement permanently fixing fair rates and equalizing business. What objection can there be to an agreement which makes no such effort, but leaves the parties to it to fix such rates as they please, provided they do it openly and according to law?

In the case of C. C. & I. R. R. Co. *v.* Closser (126 Ind. 348), the question arose whether a certain railroad pooling agreement was "in restraint of trade." The court, treating the question as one depending upon the actual and intended effect of the agreement on trade, and as a question which depends in every instance on the facts of each particular case, held that this particular agreement was obnoxious to the charge; but it took especial care not to have its decision understood as implying that no agreement could be made among railroads affecting competition which would be valid. It said: "We "preface our discussion of the central question by "saying that we are not at this point dealing with a "case where a combination is formed for the purpose "preventing ruinous competition, and in which there "is no design to stifle fair competition."

In Chicago, M. & St. P. Ry. Co. *vs.* Wabash, St. L. & P. Ry. Co. the question was raised upon a distinctly pooling agreement of a permanent character in which, as already observed, the indirect restraint upon competition is far greater than in the case of the mere temporary and incidental one effected by the agreement in question. It was held that the contract was void, but upon grounds, and with implications, which fully vindicate our agreement. It was declared that "the "design of the contract on which the appellant rests "its claim is not left to presumption or conjecture. "Its purpose is apparent on the face of the instru- "ment. Its object was not to avoid ruinous compe- "tition by entering into an arrangement to carry

"freight at reasonable rates, but its evident purpose "was to stifle all competition for the purpose of rais- "ing rates. * * * To the extent of the traffic "covered by this contract—and it covered no incon- "siderable portion of the traffic of the continent— "each company practically abdicated its functions as "a common carrier and conferred them on a new cre- "ation, for the sole purpose of suppressing competi- "tion. Before they entered into this contract each "of these companies had the power, and it was its "duty, to make rates for itself, and to make them "reasonable; but by the terms of this contract every "one of the companies was divested of all its powers "and discretion in this respect." It will be remembered that in our contract no company is in any respect divested of its powers and discretion in respect to rates, but is at liberty to charge such rates as it pleases and to enter into any competition it pleases, subject only to the giving of reasonable notice and of refraining from its contemplated action during the period of that notice.

The notion, even, that a pooling agreement is a restraint on trade has never obtained any foothold in the English tribunals. In *Shrewsbury & Birm. R. R. Co.* vs. *The London & N. W. R. R. Co.* (17 Q. B. N. S.) a distinct pooling agreement was sustained. The same case came up in the House of Lords (6 H. L. Cases 652) and, though the actual decision was there made upon another point, Lord Cottingham expressed a clear opinion that the contract was not free from objection upon any ground of public policy.

In *Hare* vs. *The London & N. W. R. R. Co.* (2 J. & H. 80) a pooling agreement was distinctly sustained by Vice-Chancellor Wood, in which he condemned "the notion that the public is benefitted by pitting "two railroad companies against each other till one is

"ruined," and declared it to be a wholly mistaken view.

In addition to these authorities we again refer in this place to the case of *Manchester, &c. R. R. Co.* vs. *Concord R. R. Co.* (20 Atl. Rep. 383), from which a long extract is hereinbefore made (p. 162). The distinguished text-writers, also, Redfield and Morawetz, referring particularly to railroad companies, declare that the notion that agreements between such companies, designed to prevent ruinous competition, are in any way opposed to public policy, as in restraint of trade or otherwise, is wholly unfounded. (1 Redfield on Railroads, Section 146; Morawetz Law of Corporations, Second Ed., Sec. 1131.)

If we turn, for a moment, to the point of principle, how is it possible to sustain the notion that agreements between the operators of public franchises like railroads, simply designed to protect themselves against ruinous competition, are a restraint upon trade, or in any way opposed to public policy, any more than agreements between individuals or corporations engaged in ordinary business? If there were any distinction at all between the two cases it should be in favor of such agreements between railroad companies. With them competition is *involuntary*. They are obliged by law to continue to do the business. With those engaged in ordinary business competion is wholly *voluntary*. They are not obliged to do business by law, and can shift their capital into other pursuits which railroads cannot. We repeat what we have heretofore argued at greater length, that the railroad business, having been subjected by the deliberate policy of the public to free competition, and those who are engaged in it being *obliged by law* to carry it on, and being unable to retire from it, any law or doctrine which would deprive them of the power, not of destroying or breaking up the competi-

tion, but of so *regulating* it as to break up an *illegal, unfair* and *ruinous* competition, would be absolutely shocking to the sense of justice.

But we have not quite done with the authorities. We have endeavored to show that there is no radical distinction between private individuals and corporations in respect to the lawfulness of contracts regulating competition, nor between persons, whether natural or artificial, engaged in business of a public nature, and those engaged in ordinary business, in respect to the same privilege. But although there is no *radical* difference, it is yet true that the courts do regard somewhat differently contracts of this description when entered into between persons engaged in business of a public nature and those engaged in ordinary business. There are two characteristics commonly attending business of a public nature such as the operation of railroads. The first is, treating the service that is rendered, as it may well be, as a commodity, it is a commodity needed by almost all the members of the community and is, to a greater or less degree, *necessary* to them. The other is that the business in most instances requires the aid of a public franchise and of such large investments that an additional supply of the service cannot be immediately furnished. It is not fit that private individuals should be at liberty to increase their own emoluments at their own will, and this leads very justly to a closer scrutiny of agreements of the character in question in these cases and to a condemnation of them whenever it appears that there is a purpose to employ them to suppress, instead of to regulate, competition. Agreements *designed* to exact high prices for transportation it may reasonably be supposed will be used for that end. That was the purpose of making them, and the necessary effect of such agreements is to restrict and restrain trade which is at all dependent upon transportation, while agreements designed only to *regulate* competition, to secure reasonable prices only, and to make them stable and

uniform, are in every point of view, directly calculated to promote trade.

We do not understand it to be suggested in the opinion in the Trans-Missouri case that agreements simply designed and operative only to restrain ruinous competition are in any manner objectionable when entered into by persons engaged in *ordinary* business. They have been repeatedly sustained, and, it is believed, nowhere condemned. But agreements between even such parties, when calculated and designed simply to raise prices by suppressing ordinary competition, are equally obnoxious to the law. It will be enough to refer to the authorities without extensive citations from them. In re Wiggins *vs.* Evans, 3 Y. & J. 318; Perkins *vs.* Lyman, 9 Mass. 522; Schranker *vs.* Scharinghausen, 50 Mo. Ap. 522; Sayer *vs.* Louisville Union Benevolent Association, 1 Duval, Ky. 142; Collins *vs.* Locke, 4 Law Rep. Ap. Cases, 674; Central Shade Roller Company *vs.* Cushman, 143 Mass. 355; Gloucester &c. Co. *vs.* Russia Cement Co., 153 Mass. 92.

The opinions of the Interstate Commerce Commission so frequently expressed should be allowed great weight, even upon the legal question. It is said in the opinion in the Trans-Missouri case (166 U. S. 338) that this Commission "has never distinctly "stated that agreements among competing railroads "to maintain prices are to be commended, or that "the general effect is to be regarded as beneficial." Surely it cannot be intended to be intimated that this Commission has not repeatedly and in the most distinct manner commended agreements among railroad companies *to regulate competition and to check ruinous competition*. The passages herein already cited from the decisions as well as the reports of that body, abundantly establish this. (See *supra* pp. 107-129.)

But how can any doctrine, if there were any such, making a distinction between agreements supposed to restrain trade when made by persons engaged in em-

ployments of a public nature and those made by persons engaged in ordinary business, or between such agreements made by natural persons and those made by artificial persons, be properly involved in the construction of a statute making *all* contracts combinations and conspiracies in restraint of trade, in respect of whatever trade or between whatsoever parties, criminal? The statute neither makes nor permits any such distinction. The only question which can be made in any case is: Does the contract or combination rainrest trade within the meaning of the statute? Indeed, the suggestion of such a distinction assumes that the statute was levelled especially against railroads, whereas it is admitted that there was the greatest doubt in the minds of the legislators who enacted it whether it was applicable to railroads at all.

II.—In connection with the subject of authority it is pertinent to observe that the statute in question attempts *no new definitions* of restraint upon trade, or conspiracy, or monopoly. It leaves the whole body of the law unchanged upon those points. Whatever before the act was not a restraint upon trade, or a monopoly, is not such now.

1. It will not be uninstructive to glance at a chapter of history relating to legislation on the subject of public policy and learn the consequences of errors which Congress was wise enough not to imitate.

Some centuries ago, when trade and commerce were on a narrow scale, and the facilities for transportation and communication small, certain occupations were carried on which were thought to have, and in many

instances, doubtless, did have, an injurious effect. The market towns were the principal places in England where supplies of flour, provisions, &c , were to be procured, and there was a class of men called *forestallers*, who found a profit in going out and meeting the market wagons as they came in from the surrounding country and purchasing their stocks with the view of exacting largely increased prices from the daily necessities of consumers. Others carried on other speculative operations called *regrating* and *engrossing*, by which they insinuated themselves between the producer and the consumer, in order to make a profit out of the latter. Some of these operations were probably of an oppressive and mischievous tendency, injurious to trade, and might perhaps, had proper distinctions been observed, have been made the subjects of penal law. But Parliament, overlooking the vital principle which enjoins freedom of trade, and losing sight of the many public advantages now admitted to come from some of the pursuits thus prohibited, undertook to prohibit them all, and from time to time statutes were enacted, aggregating in number more than forty, and with constantly increasing severity, by which *new statutory definitions* of things supposed to be of public injury to trade were made. But bitter experience, after a time, taught the lesson, that, in the attempt to abolish bad practices, care must be taken not to embrace what is good. It was found that these very statutes, designed to benefit trade, resulted in working the greatest mischief to it. Many repealing acts were passed by which those statutes supposed to be most objectionable were abrogated, but all of them were eventually found to be more productive of mischief than of benefit, and finally all were repealed. But even then the work of correction was not complete, for assertions were made that some of these statutory offences were offences at common law prior to the statutes, and prosecutions were still kept up, until a final act was

passed sweeping utterly away all the statutes and the common law, if there were any such. One of these statutes recited in penitential shame, "that it had "been found by experience that the restraints laid by "several statutes upon the dealing in corn, meal, flour, "cattle, and sundry other sorts of victuals, by pre-"venting a free trade in the said commodities, have "a tendency to discourage the growth, and to en-"hance the price of the same, which statutes, if put "in execution, would bring great distress upon the "inhabitants of many parts of this kingdom, and in "particular upon those of the cities of London and "Westminster;" that is, that the legislation was found to have an effect precisely the opposite of what was intended.

By several other statutes the British Parliament undertook to interfere with the business of carriers by providing for the establishment of maximum rates. In more enlightened times the error of this step, and the unwisdom of interfering with the ordinary operation of the natural laws to which competition is subject were in like manner confessed by a most penitential repealing statute.

A perusal of these repealing statutes will be found instructive, and the three principal ones are printed in an Appendix to this brief.

EIGHTH POINT.

The agreement is in no manner in violation of the provisions of the second section of the act. It creates no monopoly, nor is it an attempt, or conspiracy to monopolize.

1.—It does not embrace or attempt to combine all

the competing parties. It does not include all the through east and west railway lines and no lines of canal or other water transportation. So long as they are outside of the agreement there can be no pretence of a monopoly.

2.—Even if it did include all competitors, an agreement which leaves all the parties open to permanent competition with each other, creating at the most a temporary restraint for thirty days in order to insure notice has no feature of a monopoly.

The foregoing completes our intended argument upon the question whether the agreement is, *in fact*, in restraint of trade or commerce, or for a monopoly. It reaches far beyond the point of mere reasonableness and demonstrates its *necessity;* its necessity not only to secure the general harmonious operation of the system of railroad transportation, but also to secure stable, uniform, published rates. The only real obstacle to the attainment of these is, *secret* and because secret, *unlawful*, competition. To do away with this is the *sole* object of every provision in the agreement which is challenged by the present action. A positive enactment of law required the real rates to correspond with the published ones. These provisions are simply a scheme by the aid of which, and of which alone, obedience to the law may be secured. And this is what those who have moved the present action declare to

have been prohibited and made criminal by the Congress of the United States!

NINTH POINT.

In the attempt, made by the bill, to array every possible objection to the agreement, there is an evident purpose to suggest that its Eighth article, in connection with other subsidiary provisions, constitutes pooling, and therefore is a violation of Section 5 of the Interstate Commerce Act. There is no foundation for such a charge. The agreement in no manner violates any provision of the Interstate Commerce Law.

I.—The term "pooling of freights," taken by itself, and without reference to any known practice existing prior to the passage of the act, is absolutely indefinite and uncertain, and for that reason ineffectual. No one can say what its meaning is.

II.—If its meaning can be ascertained only by *proof* of the prior existence of some practice known as "pooling freights," allegations of the existence of such practice would be material and essential to the bill of complaint; and for the want of them, the action cannot be maintained.

III.—If the meaning of the language "pooling of freights" is to be sought from practices existing prior to the act so *notorious* that Courts may take *judicial notice* of them, the action must fail, for there were no practices describable by the term "pooling" possessing that requisite notoriety.

IV.—Should the Court, however, feel inclined to find, from some source, some meaning of this term "pooling of freights" sufficiently definite for the purposes of penal law, the attempt will immediately land us either in uncertainty, or in a conclusion that it describes something quite different from anything agreed upon in this traffic association agreement.

1. We must begin by defining, as far as we can from the language itself, the term "agreement for the pooling of freights;" and, first, what the term "pooling" means, for the obscurity begins here. Strictly speaking, it must mean the bringing together into a common receptacle of different parts of the subject received, in the first instance, by the different parties and to be pooled, to the end that the aggregate should be *distributed among them in certain proportions, as being the common property, in such proportions, of all.* In this sense there is no violation of the Interstate Commerce Act, for no one will pretend that the agreement provides for, or contemplates, such actual and physical pooling. It may be said, however, that this interpretation is too rigid, and that the main purpose being division, it would be "pooling" if the subject agreed to be pooled were *treated*, for instance, by keeping an account of the merchandise

received by each road and assigning to each, by charging and crediting, its proper share, *as if* it were thus brought into a common receptacle for the purpose of such division, and so divided; and we are willing to adopt this larger meaning.

2. But what does "freight" mean? Does it mean the physical merchandise to be carried, or the money compensation received for carrying it? These are very different things and a prohibition of the one would by no means be the prohibition of the other. The act elsewhere employs the word in *both* significations—in the 7th section as meaning property shipped, and in the 20th as the *charge* for the property shipped. Here we are again landed in an *uncertainty* which cannot be cleared up, at least with that distinctness which the penal law requires. The bill itself confesses this uncertainty by alleging that the agreement means *both* things? It charges an agreement to combine the physical traffic *and* to divide the earnings.

The best construction would seem to be to make the word "freights" mean the *compensation* for the property shipped—that is, the same thing substantially as is subsequently described as "earnings." It will be observed that by the grammatical structure of the section it is only the *agreement* to pool which is prohibited. In the case of "earnings" an *agreement* to divide is not prohibited, but the *act* of division is. If these terms mean *different* things, why is not the *agreement* to do them prohibited in each case? But if we understand them as meaning the *same thing*, then both the *agreement* and the *act* are prohibited. The draughtsman apparently thought it important first to prohibit the *agreement* to divide *earnings*; and, then thinking that the mischief might be accomplished by actually dividing them *without* agreement, he proceeded to punish the

act itself. This construction is made somewhat more probable by the concluding sentence. So far as the *agreement* was concerned, there could be, in the absence of special provision, but a single breach and a single offence. The draughtsman wished to increase the punishment, and therefore made each day's continuance a separate offence; but this he did only in the case of the *agreement*. In the case of the *act*, there was no need of it; for, from the nature of the case, the acts would be separate, and each of them distinct offences, and so multitudinous as not to require, for purposes of severity, any form of multiplication.

3. Upon the construction above suggested, the action cannot be maintained, for it will not be pretended that there is anything in the agreement looking to a division of the *earnings* from *competitive* traffic; and if there were it would not matter, for the mere *agreement* to divide those is not prohibited; and there is no ground for changing the grammatical construction, which makes "to divide" immediately dependent on "unlawful" and make it dependent on "contract agreement or combination." If this latter had been intended, the language should have been, "*for the division* between them," etc.

V.—But let all uncertainties be put out of sight, and the assumption be roughly and boldly made, in the teeth of the grammatical construction, that "freights" means the physical traffic; there is nothing in the Eighth Article of the agreement or elsewhere which violates the fifth section of the Interstate Commerce Act.

1. One thing is clear, the defendants have done nothing but enter into an *agreement*. They are charged with no other act. If this is not an agreement for the "pooling" of freights it is no violation of the prohibition; and it certainly is *not*.

Pooling, as has already been shown, if we assign to the word the most comprehensive meaning possible, has yet some essential features; and the main one is that the thing pooled, be it the physical traffic, or the money received, or receivable, for carrying it, be actually brought, or contemplated and treated *as if* brought, into a common receptacle *as being a subject belonging to the parties in common in certain definite proportions*, to the end that it may be divided in such proportions between them. Whatever may be the means employed to effect this object, one thing is essential; namely, *a definite right in each party* to a *definite share* of the *things pooled*; a right susceptible of legal enforcement. No pooling agreement had, it is entirely safe to say, been known at the time of the passage of the Interstate Commerce Act which did not confer such rights. No railroad company would have seriously thought of entering into anything in the nature of a pooling agreement, which did not secure this right. It is immediately obvious that no such right, nor anything approaching it, is secured by the agreement in question. What is done, and all that is done, or contemplated, is contained in the clause "The Managers are charged with the duty of securing to each company, party hereto, equitable proportions of the competitive traffic covered by this agreement so far as can legally be done." No one can pretend that any enforceable right whatever, in any traffic whatever, is conferred upon any party by this language; and unless such a right is conferred no *pooling* is effected, or agreed to be effected.

If there were such a right it could be enforced by

action. What would a plaintiff in such an action have to do in order to make out a case?

First.—He would have to prove what *his share* in the competitive traffic was; and this with certainty, as being 20 or 30, or 40 per cent., or some other share equally distinct; and this, it is at once apparent, he could not do. How could he prove what was *equitable?* Courts of equity sometimes say, when they have no other lights to guide them, that *equality is equity*. Was it intended here that the rivals should participate equally? We know better than that. What then was to be the guide? Should it be the amount of *capitalization*, or the *expense of maintaining* the road, or the relative *capacity* of the road to carry? None of these things certainly could have been intended. Could it have been the *usual* amount it had *before* received; or the amount which under prior agreements had been *allotted* to it? This could not be, for it is notorious that none agreed that these were *equitable*. All were always complaining. And, besides, the *circumstances*, such as ability, opportunity, expense, and every other element which might affect what was *equitable* were changing every day.

It is entirely manifest that by *equitable* no definite share was intended, but that the intention distinctly was to have it *indefinite*, and leave the judgment and discretion of the managers absolutely unhampered.

Second.—What would be the plaintiff's next step? It would be to prove that it had not secured its share, but that a part had gone to others; but this would amount to nothing. No right of action is given, or contemplated, against other parties to the agreement in such a case. Each has the right to carry everything offered to it, and *to retain the entire compensation*. The sole right the plaintiff could assert would be against the managers for a failure to perform their *duty*.

Third.—The plaintiff would, therefore, be bound to proceed further and show that there was some *lawful act which the Managers might and ought to have performed*, which would have directed traffic from rival lines to itself, and have helped to make up the deficiency. We say *some lawful act;* for the agreement was carefully drawn so as not to call upon the managers to do any unlawful thing.

We now see precisely the force and effect of the agreement in the particular under consideration. It does not attempt to pool traffic or earnings. It gives no right in either to any party. No moneys received by one can ever be recovered from it by another. No party can ever effectually demand that a pound of freight should be directed to its line which would otherwise go to another. The only thing done is to make it the duty of certain persons called "managers" to bear in mind that it is highly important that each party to the agreement should receive what in their judgment is an *equitable* share of the competitive traffic, and that if there are any *innocent and lawful things* which they may do, which would tend to secure that object, they should do them.

2. No "pooling of freights," other than by a division, principally, or incidentally, of the gross or net receipts of the earnings can be made by railroad companies. "Pooling," as already shown, means the bringing together of various parts of the thing pooled into a common receptacle to the end that it may be divided in specific shares among those to whom it is assumed to belong. It is immediately obvious that this cannot be done with the *physical tonnage*. The difficulty and expense of thus handling the competitive tonnage of the great trunk lines, received at points hundreds of miles apart, would, of itself, make such a thing utterly impossible. But, besides that,

such a treatment of actual merchandise destined for shipment assumes that it is *in the power* of railroad companies so to treat it, which is a wholly false assumption. Most of the traffic is destined by its owner to be carried by certain lines, and must be so carried. An unlawful diversion of it would not be dared by the railroad companies. Not only would it involve pecuniary liabilities which would under no circumstances be assumed, but every such trifling with the wishes of shippers would involve great loss of business to the parties guilty of it. The money receipts indeed can be thus dealt with, for they are in the power of the railroads, and can be transmitted from place to place without expense. Some considerable control can indeed be exerted over unrouted traffic, and a great deal more in the way of equalization may be effected by inducing shippers to send by one line rather than by another.

All that the roads themselves have legal power to do is to *treat* the traffic *as if* it had been thus pooled, and this may be effected either by transmitting all the gross or net receipts to a designated depository; or by having each company keep an account of such receipts, and make those receiving an excess pay over that excess to a depository for distribution among those who have received less than their respective shares. No pool of railroad freights has ever been known which did not adopt one or the other of these methods. No other is possible.

An account and division of earnings, therefore, is a necessary part of every pool. No company could stop taking freight after it had received its own share. It could not refuse to carry any thing offered. This is fully recognized by the statute in question, for the division of money earnings is expressly and separately prohibited.

It is a necessary consequence of the foregoing that the agreement in question is not one for the pooling

of freights, even if we understand "freights" as meaning the physical subjects of transportation.

3. It may be argued that the *end in view* is to bring about, as far as possible, what is vaguely called an *equitable division* of the traffic, and that this object is sought to be accomplished by *agreement*, and, therefore, that the agreement is, so far, properly described as one for the "pooling of freight." But this is not quite accurate. The end in view is perfectly described by the Eighth Article, and no other purpose can be imputed to the parties than the one there stated, namely, that the managers shall take such steps as they lawfully may, to secure to the parties equitable proportions of the competitive traffic. This is agreed to, and nothing more is agreed to; and this certainly is *not* pooling, nor agreeing to pool.

4. It may be argued that this is *evading* the statute. If by this is meant that the thing does not fall within the prohibition of the statute, no objection is taken to the statement. Violations of prohibitions cannot be asserted where the thing prohibited is not done. But if it be meant that there has been an unsuccessful *attempt* to evade the statute, but that the real act prohibited has been, in substance, though not *in form*, committed, the assertion is in no degree, or respect, true. The doing of things other than the making of an agreement for the pooling of freights, which may accomplish *some* of the ends which pooling would bring about is *not* prohibited, nor intended to be.

5. The fallacy which underlies the argument that

the Eighth Article is an agreement for the pooling of freights is that because it is designed to accomplish some of the same objects which pooling accomplishes, it is *pooling*. But pooling is a totally different thing from the objects accomplished by it; and if those *objects* are not prohibited by law, they may be lawfully accomplished by any means, other than pooling, which will bring them about. Undoubtedly one of the results of an agreement to pool is to check, though not to destroy, competition, although it does destroy ruinous competition. The view of the complainants is that this was the sole reason why such agreements were prohibited. That we do not and cannot know, but have the best grounds for believing that it was neither the sole, nor the principal, reason. If all restraints on competition were designed to be prohibited, they would all have been directly prohibited. Nothing would have been easier than to prohibit all *agreements* or *acts tending to repress, or designed to repress*, competition. But this was not done. It was industriously avoided.

6. It may be urged that under our construction of the Eighth Article which simply calls upon the managers to do what may lawfully be done to secure equitable shares of the traffic to the several parties to the agreement, the provision will be ineffective. We are sorry to say that there is much ground for apprehension that it will be. Confident expectations on this point have at no time been entertained. It is not for the reason that they thought it the best scheme for checking ruinous competition that the parties entered into it, but because they thought it was all the law permitted them to do. Had they been allowed to make an agreement for the pooling of freights, they would have made one.

At the same time, however, they are not without

hopes that the provisions will be substantially efficacious; and the principal ground of hope is that the parties will voluntarily lend their aid to such lawful methods of securing to each an equitable share of the business as the managers may adopt and recommend; and that in this way such equitable share, or something approaching it, may be so far secured that the *motives* to a deadly and ruinous competition may be in great measure removed: and that all will find it to be to their interest to put down all secret and illegitimate competition, and invoke the execution of the law against any who may engage in it.

7. It may be asked *what acts* the managers could perform which would tend to secure to the several parties equitable shares, or shares thought to be equitable, of the competitive business, other than by directly manipulating the traffic in such manner that each party should receive such share. If none could be pointed out, it would not matter, for this would not show an *agreement* to *pool*, which involves an enforceable right in each party to a definite share; nor would an *actual* manipulation of the traffic, could the managers accomplish it (which they could not), *without agreement*, be prohibited by the statute. It is not *actual* divisions of the traffic, but *agreements* to divide which are condemned. But we prefer to answer the question otherwise, and to point out the lawful and innocent things which may be done.

a. The *soliciting agents* of particular lines, heretofore the instrumentalities by which ruinous and illegitimate competition has been carried on, may be withdrawn, leaving the traffic to follow its natural channels, subject to the rates already agreed upon, which

the parties cannot change except in the way pointed out by the agreement. If these rates should turn out not to produce a living revenue to some road, the managers, may increase its traffic by allowing a differential to it, that is, permit it to carry at a somewhat lower rate, and the differential may be increased or diminished as the end in view may require. If the rates are so low that no differential would be practicable, that is, if the weak road could not carry at a lower rate and make any profit, it must relinquish business and become bankrupt.

b. If anything more should be needed, shippers who stand indifferent as to routes may be solicited to send by a particular route, and agents may be appointed for this purpose, who, being under the exclusive control of the managers, may be required to obey their instructions as to amounts for which they may solicit. Such soliciting agents, being employed by no particular interest, would be under no temptations to engage in secret or unlawful means to secure traffic.

c. Inasmuch as the hands of the several parties are tied against active and open soliciting, they cannot well prevent the operation of this scheme, without engaging in the unlawful practice of *secret* rate cutting, which will be *war*, not only against the law, but against the managers as well, and the latter will be directly interested to uncover, expose and bring to punishment such offences, and to that end, they have the power, not likely to be resisted, of examining the books and all officers of any company.

8. Possibly the point may be made (for in a

business of such importance we must anticipate every imaginable position) that although the parties to the Traffic Association have not entered into any *agreement* for the pooling of freights, they have entered into a *combination* for that purpose; but this would be a fallacy almost too obvious for elaborate exposure.

The term "combination" as employed in the statute, like the term "conspiracy" imports something *unlawful*. It must either have an unlawful *object*, or seek to accomplish a *lawful* object by unlawful *means*. Neither of *these* things appear; both the object and the means are entirely lawful.

a. Any assertion that the *object in view* was unlawful would only be a reassertion of the proposition already refuted; namely, that the thing which the parties designed was the *pooling of freights*. This was the very thing which they did *not* design. The bill of complaint alleges no act of the parties other than the making of the *agreement*. Agreement does, indeed, import *combination*, though not a criminal combination. Inasmuch as the only combination here asserted is the *agreement*, it is true that what the parties *agreed* to do they *combined* to do; and it is, on the other hand, equally true that what they did *not agree to do*, they did *not combine* to do. What they designed, and all they designed, they have fully stated, namely, *to make it the duty of the managers to use all lawful means to secure to the several parties what they might deem equitable portions of the competitive traffic*; and this is not *pooling*, for it lacks the essential elements of pooling. This being the extent of their *purpose*, must necessarily be the extent of their combination.

b. There is nothing unlawful in the means sought

to be employed. One of those methods is the agreement upon rates admitted to be reasonable. It has already been shown that there is nothing unlawful in this. Another of the methods pointed out by the agreement is the abandonment of separate and independent soliciting agents. This surely is not unlawful, No person can be *obliged* to enter into competition with others in any business; still less to employ those methods the operation of which is fruitful of both public and private mischief. Independent soliciting agents are the very means by which ruinous, illegitimate and unlawful competition is carried on.

Another of the methods may be that of the appointment or allowance by the managers of soliciting agents with the view of securing traffic to roads which might otherwise not obtain an equitable share. What is there of an unlawful nature which can be suggested in this? Let it be supposed that the hack drivers in great cities, where the rates had become fixed either by common consent or municipal ordinance, should become impressed with the mischiefs and nuisances which have been observed to a greater or less degree by every one, springing out of unrestrained and fierce competition, such as the deafening yells, lying representations, and pulling and hauling, amounting to almost to personal assault, by the coachmen, and should make an agreement for the cessation of these practices and the appointment of paid agents who should gently guide those wishing conveyance, so far as they might be willing to submit to such guidance, to a coach, recognizing the superior claims of those who had the best equipment, but attempting, so far as possible, to furnish some employment for all; would this be thought to be unlawful, or in any manner tending to the public injury? But yet this is all which is attempted by the provisions substituting soliciting agents acting under the supervision of managers in the place of individual agents for each company.

Another means which may be employed is the allowance of a differential in favor of a weaker party who may need it. A rival who labors under a disadvantage has no means of gaining business except by cutting under. Such cutting under, if made in the course of unrestrained competition, naturally tends to, and will usually result in a corresponding cut by the more powerful contestants, thus compelling the weaker one to make a further cut, and so on to the point of exhaustion and destruction of the latter. Can it be unlawful for the strong ones to *agree* that they will not drive the weak ones to suicide? This point has been already fully covered.

But, finally, the clause "so far as can legally be done" is a short and conclusive answer to any charge that the agreement is a violation of the prohibition of the Interstate Commerce Law against pooling. *There is no agreement to do any particular thing whatever.* The agreement is that it shall be the duty of the managers to bring about a certain result, namely, equitable proportions of the competitive traffic, so far as they legally may. If there are any efforts which may lawfully be made to bring about this end, there is an agreement that they shall, or that some of them shall, be taken. If there are no such efforts, then there is no agreement to do anything. If it were unlawful, or made unlawful by the Interstate Commerce Law, for railroads to take steps, by diverting unrouted traffic, to a particular line, to give it what might be thought its equitable share of business, or to accomplish the like result by inducing shippers to give traffic to it, then there is no agreement to do these things; and if any of the parties to this agreement were to bring any action based upon the allegation that the managers had not done such things, would any Court think for a moment that the action could be sustained after the illegality had been pointed out? The following authority is directly in point:

Davies *vs.* Davies, 36 Ch Div. 359, 393.

It was urged in the Court below that the *purpose* of the parties in inserting this clause was to *pool*, and that the clause "so far as may legally be done" was framed as a device to enable them to escape punishment; in other words that *they did not really mean what they said*. But no such argument can be made in this action. In this action the question is what the parties have *really agreed* to do, and that is to be determined by a correct interpretation of their language; and in the work of interpretation we must necessarily assume that parties mean exactly what they say. The same rule must be adopted as if the suit were by one of the parties against the others, or against the managers, founded on an allegation of a breach of the agreement.

It must be borne in mind that this action is based upon the *agreement* alone. No *acts* in the nature of pooling are alleged. If the roads, after making the agreement, had actually proceeded to pool the traffic in a manner indicating a common purpose to do it, they might be indicted under the act for a *conspiracy* to pool, and the agreement might have been given in evidence to prove the conspiracy, notwithstanding the saving clause against illegality, and then the suggestion that this clause was introduced as a device might legitimately be made.

Lastly.—The decree should be affirmed.

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APPENDIX.

Statutes at Large, 12 Geo. III. (Vol. 29),
Cap. LXXI.

AN ACT for repealing several laws therein mentioned against badgers, engrossers, forestallers, and regrators, and for indemnifying persons against prosecutions for offenses committed against the said acts.

Whereas, it hath been found by experience, that the restraints laid by several statutes upon the dealing in corn, meal, flour, cattle, and sundry other sorts of victuals, by preventing a free trade in the said commodities, have a tendency to discourage the growth, and to enhance the price of the same ; which statutes, if put in execution, would bring great distress upon the inhabitants of many parts of this kingdom, and, in particular, upon these of the cities of London and Westminster ; be it therefore enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal and commons, in this present parliament assembled, and by the authority of the same. That an act made in the third and fourth year of King Edward the Sixth, intituled an act for the buying and selling of butter and cheese ; and also an act, made in the fifth and sixth year of King Edward the Sixth, intituled an act against regrators, forestallers and engrossers ; and also an act made in the third year of Philip and Mary, intituled an act for the keeping of milch kine and for breeding and rearing calves ; and also an act made in the fifth year of Queen Elizabeth, intituled an act touching badgers of corn, and droves of cattle

to be licensed; and also an act made in the fifteenth year of King Charles the Second, intituled an act to prevent the selling of live fat cattle by butchers; and so much of an act made in the fifth year of Queen Anne, intituled an act for continuing the laws therein mentioned relating to the poor and to the buying and selling of cattle in Smithfield, and for suppressing of piracy, as relates to butchers selling cattle alive or dead within the cities of London and Westminster, or within ten miles thereof; and all the acts made for better enforcement of the same, being detrimental to the supply of the laboring and mauufacturing poor of this kingdom, shall be and the same are hereby declared to be repealed.

II. And be it further enacted by the authority aforesaid, that all informations, indictments, suits or prosecutions, already commenced, for the inflicting any punishment, or for the recovery of any fine, penalty, or forfeiture, under the said former acts, or any of them, shall cease and determine; and no further proceedings shall be had thereupon; and that no information, indictment, suit or prosecution, shall be commeneed or prosecuted against any person or persons whatsoever, under or by virtue of the said acts or any of them; but that all such proceedings shall be void, and of no effect; any law, statute or usage, to the contrary notwithstanding.

Statutes at Large, 7 and 8 Vict. (Vol. 84), Cap. XXIV.

AN ACT for abolishing the offences of forestalling, regrating and engrossing, and for repealing certain Statutes passed in restraint of Trade.

(4th July, 1844.)

"Whereas, divers Statutes have been from Time to "Time, made in the Parliaments of England, Scotland, "Great Britain and Ireland, respectively prohibiting "certain Dealings in wares, victuals, merchandize, and "various commodities by the names of badgering, fore-"stalling, regrating and engrossing, and subjecting to "divers Punishments, Penalties, and Forfeitures, Per-"sons so dealing; and, whereas, it is expedient that "such Statutes, as well as certain other Statutes made "in hindrance and in restraint of Trade, be repealed, "and, whereas, the Act of the Parliament of Great "Britain, was passed in the Twelfth year of the "Reign of King George the Third, intituled An Act "for repealing several laws there-mentioned against "Badgers, Engrossers, in Forestallers, and Regraters, "and for indemnifying Persons against Prosecutions "for offences committed against the said Acts, where-"by, after reciting that it had been found by expe-"rience that the Restraint laid by several Statutes "upon the dealing in Corn, Meal, Flour, Cattle, and "sundry other Sorts of Victuals, by preventing a free "Trade in the said Commodities, have a Tendency to "discourage the Growth and to enhance the Price of "the same, which Statutes, if put in execution, "would bring great Distress upon the Inhabitants of "many parts of this Kingdom, and in particular upon "those of the Cities of London and Westminster, "sundry Acts therein mentioned and all the Acts "made for the better Enforcement of the same, were "repealed, as being detrimental to the Supply of the "labouring and manufacturing Poor of this Kingdom.

" And, whereas, notwithstanding the making of the " first-recited Acts, Persons are still liable to be prose- " cuted for badgering, engrossing, forestalling, and re- " grating, as being offences at Common Law, and also " forbidden by divers Statutes made before the earli- " est of the Statutes thereby repealed." For Remedy thereof, and for the Extension of the same Remedy to Scotland and to Ireland, be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That after the passing of this Act, the several Offences of badgering, engrossing, forestalling, and regrating be utterly taken away and abolished, and that no Information, Indictment, Suit or Prosecution shall lie either at Common Law or by virtue of any Statute, or be commenced or prosecuted against any Person for or by reason of any of the said offences or supposed offences.

II. And be it enacted, That the several Acts and Parts of Acts made in the Parliaments of England and Scotland, Great Britain and Ireland hereinafter mentioned, shall be repealed, but not so as to revive any Act repealed by any of the Acts hereby repealed; (that is to say)

The following Acts and Parts of Acts of the Parliament of England, to wit:—

So much of an Act passed in the Fifty-first year of the Reign of King Henry the Third, intituled a Statute of the Pillory and Tumbrel, and of the Assize of Bread and Ale, as is now in force;

So much of an Act passed in the Twelfth Year of the Reign of King Edward the Second, intituled, No officer of a City or Borough shall sell Wine or Victual during his office, as is now in force;

So much of an Act passed in the Reign of King Henry the Third, King Edward the First, or King

Edward the Second, intituled The Punishment of a Butcher selling unwholesome Flesh, as provides punishment for a Butcher or Cook that buyeth Flesh of Jews, and selleth the same unto Christians;

The whole of an Act passed in one of the three last-mentioned reigns, intituled, No forestaller shall be suffered to dwell in any town;

The whole of an Act passed in the Twenty-third year of the Reign of King Edward the Third, intituled, Victuals shall be sold at reasonable prices;

The whole of an Act passed in the Twenty-fifth year of the same Reign, intituled The penalty of him that doth forestall Wares, Merchandise or Victual;

So much of an Act passed in the Twenty-seventh year of the same Reign, intituled, A Statute of Provisors as provides that Commission shall be granted to inquire of offenders contrary to the Statute of 23 Edw. 3, C. 6, and as enacts "The Penalty of forestalling "of Merchandizes before they come to the Staple;"

The whole of two Acts passed in the Twenty-first Year of the same Reign, respectively intituled The Statute of Herrings, and another Statute of Fish;

The whole of an Act passed in the Thirty-fifth Year of the same Reign, intituled An Ordinance of Herring;

So much of an Act passed in the Thirty-seventh year of the same reign, intituled Merchants shall not ingross Merchandizes to inhance the Prices of them, nor use but one sort of merchandize, as is now in force;

The whole of an Act passed in the same Year, intituled Clothiers shall make cloths sufficient for the foresaid Prices, so that this Statute for default of such cloths be in no wise infringed;

The whole of an Act passed in the Second Year of the Reign of King Richard the Second, intituled A confirmation of the Statute of 25 Edw. 3, St. 4, c. 3, against forestallers;

So much of an Act passed in the Thirteenth Year of

the same Reign, intituled The Rates of Labourers Wages shall be assessed and proclaimed by the Justices of the Peace and they shall assess the Gains of Victuallers; who shall make Home Bread, and the Weight and Price thereof, as is now in force.

So much of an Act passed in the Fourth Year of the Reign of King Henry the Fourth, intituled An Hostler shall not make horse bread; how much he may take for oats, as is now in force;

So much of an Act passed in the Twenty-fifth Year of the Reign of King Henry the Eighth, intituled, Proclamations for the Prices of Victuals, viz.: the pricing of them and proclaiming the prices; as is now in force;

So much of an Act passed in the Twenty-eighth Year of the same Reign, intituled, For prices of Wines, as is now in force, not relating to the gauging and measuring of Wine, Oils, Honey, or any other Liquors or Things;

So much of two Acts passed in the Session of Parliament holden in the Third and Fourth Years of the reign of King Edward the Sixth, respectively, intituled, an Act for buying and selling of rother Beasts and Cattle, and an Act for the buying and selling Butter and Cheese, as is now in force;

The whole of an Act passed in the Session of Parliament holden in the Fifth and Six Years of the same reign, intituled, an Act against Regraters and Ingrossers of tanned Leather, except the Prohibition of currying or dressing tanned Leather within the City of London and the suburbs thereof, as provided by the last mentioned act;

Also the following Acts of the Parliament of Scotland; to wit:

An Act passed in the Year One thousand five hundred and three, intituled, of Malt Makaris in Burrow Towns;

An Act passed in the Year One thousand five hundred and thirty-five, intituled, Off Forstallaris;

An Act passed in the Year One thousand five hundred and forty, intituled, For eschewing of Derth of Wittalis, Flesche and Fysche:

Also an Act of the same Year, intituled, For Stanching of Derth and Prices of Wyne, Salt and Tymmer:

Also an Act of the same Year, intituled, Anentis Forstallaris;

An Act passed in the Year One thousand five hundred and fifty-five, intituled, Anent the Disposition of Wyne, Salt and Tymmer brocht into the Realme;

An Act passed in the Year One thousand five hundred and seventy-nine, entituled, For Punishment of Regrateris and Forstallaris;

An Act passed in the Year One thousand five hundred and ninety-two, intutled, Aganis Foirstallaris and Regraittaris;

An Act passed in the Year One thousand six hundred and sixty-one, intituled, An Act for erecting of Manufactories:

Also the following Acts and Parts of Acts of the Parliament of Ireland, to wit:

The whole of an Act passed in the Fourth Year of the Reign of King Edward the Fourth, intituled, An Act against Engrossers and Regrators of Corn;

The whole of an Act passed in the Thirty-third Year of the Reign of King Henry the Eighth, intituled, An Act for Grey Merchants, as revived and perpetuated by a subsequent Act passed in the Eleventh Year of the Reign of Queen Elizabeth, intituled, An Act for reviving the Statute against Grey Merchants, the Statute for Servants' Wages, and the Statute Jeofails;

So much of an Act passed in the Second Year of the Reign of Queen Anne, intituled An Act to prohibit Butchers from being Grazers, and to redress several Abuses in buying and selling of Cattle, which Act is perpetuated by another Act made in the Ninth year of the Reign of Queen Anne, as prohibits any Butcher from being a Grazier, or keeping in his Possession

or in trust for him, above Twenty Acres of Land, or from selling any Cattle to any other Butcher in Dublin, or within Five miles thereof, or from keeping at Hay or Feed Oxen or other Cattle for above Ten Days, or from exposing for sale any Oxen or other Cattle within Twenty miles of the Place where bought; and which prohibits any Person from selling or exposing for sale any Cattle or Sheep on the same Day when bought.

So much of an Act passed in the Tenth Year of the Reign of King George the First, intituled an Act for regulating abuses committed in buying and selling Cattle and Sheep in the several markets of this Kingdom, as prohibits Cattle from being bought within six miles of any market:

The whole of an Act passed in the Fifteenth Year of the Reign of King George the Second, intituled An Act to explain and amend a Clause in an Act passed in the Second Year of the Reign of Queen Anne, intituled "An Act to prohibit Butchers from being "Graziers, and to redress several abuses in buying "and selling of Cattle, and in slaughtering and pack-"ing of Beef, Tallow and Hides:"

The whole of an Act passed in the Thirty-first Year of the Reign of King George the Second, intituled an Act to prohibit Salesmen from being Graziers, and to redress several abuses in buying and selling Cattle or Meat:

So much of an Act passed in the Session of Parliament holden in the Thirteenth and Fourteenth Years of the Reign of King George the Third, intituled An Act for paving Streets within the City and County of the City Dublin, as authorizes a Market Jury to seize Provisions or Victuals in the Hands of any Forestaller, Regrater, or Engrosser:

So much of an Act passed in the Twenty-seventh Year of the Reign of King George the Third, intituled An Act for establishing Market Juries in Cities, as authorizes and empowers certain Market Juries to seize

Provisions or Victuals found in the Hands of Forestallers, Regraters, and Engrossers.

III. And be it enacted, That the several Acts and Parts of Acts which were repealed, as to Great Britain, by the first-recited Act of the Twelth Year of the Reign of King George the Third shall be taken, after the passing of this Act, to be repealed as to the United Kingdom of Great Britain and Ireland.

IV. Provided always, and be it enacted, That nothing in this Act contained shall be construed to apply to the Offence of knowingly and fraudulently spreading or conspiring to spread any false Rumour, with Intent to enhance or decry the Price of any Goods or Merchandize, or to the Offence of preventing or endeavoring to prevent by Force or Threats, any Goods, Wares, or Merchandize being brought to any Fair or Market, but that every such Offence may be inquired of, tried, and punished as if this Act had not been made.

V. And be it enacted, That this Act may be amended or repealed by any Act to be passed in this Session of Parliament.

7 and 8 Geo. IV.

Cap. XXXIX.

AN ACT to repeal such Parts of Two Acts of King William and Queen Mary and of King George the Second, as relate to the Settling the Rates of the Carriage of Goods.

[21st June, 1827.]

Whereas, an Act was passed in the Third Year of the Reign of King William and Queen Mary, intituled An Act for the better repairing and amending the Highways, and for Settling the Rates of Carriage of Goods, whereby it was amongst other Things enacted, that the Justices of the Peace of every County and other Place within the Realm of England or Dominion of Wales should have power and authority, and were thereby Enjoined and required at their then next respective Quarter or General Sessions after Easter Day yearly, to assess and rate the Prices of all Land Carriage of Goods whatsoever, to be brought into any place or Places within their respective Limits and Jurisdictions by any common Waggoner or Carrier, and the Rates and Assessments so made to certify to the Several Mayors and other Chief Officers of each respective Market Town within the Limits and Jurisdictions of such Justices of the Peace, to be hung up in some public Place in every Such Market Town, to which all Persons might resort for their Information; and that no such common Waggoner or Carrier should take for Carriage of such Goods and Merchandizes above the Rates and Prices so set, upon pain to forfeit for every such offence the Sum of Five Pounds, to be levied by distress and Sale of his and their Goods, by warrant of any two Justices of the Peace where such Waggoner or Carrier should reside, in manner aforesaid, to the use of the Party grieved: And Whereas another Act was passed in the Twenty-first year of the Reign of King *George* the Second, intituled An Act

to Explain and amend an Act passed in the Fourteenth year of His Majesty's Reign, intituled 'An Act for the Preservation of the Public Roads in that Part of Great Britain called England'; and so much of an Act passed in the Third year of the Reign of King William and Queen Mary, intituled 'An Act for the better repairing and amending the Highways, and for Settling the Rates of the Carriage of Goods', as relates to the Settling the Rates of the Carriage of Goods, whereby, after reciting the hereinbefore recited Act, it was Enacted, that if any Common Waggoner or Carrier should, after the Tenth Day of June, One thousand seven hundred and forty-eight, demand and take any greater Price for the bringing of Goods to the City of London, or to any Place within the Bills of Mortality, than was allowed and Settled by the Justices of the Peace for the county or Place from whence Such Goods were brought for the carrying of Goods from London to the Said County or Place, Every Such Carrier or Waggoner should for every Such Offence forfeit and pay the Sum of Five Pounds to the Use of the Party grieved, to be recovered and levied in the Manner by the Said recited Act directed, or by Distress and Sale of his Goods, by Warrant under the Hands and Seals of any Two Justices of the Peace for the Counties of Middlesex or Surry, or City of London, or City and Liberty of Westminister; and the Clerk of the Peace for Every County and Place should immediately after Easter Session yearly certify to the Lord Mayor of the City of London, and also to the respective Clerks of the Peace for the Counties of Middlesex and Surry and City and Liberty of Westminster, the Rates and Assessments made for the Carriage of Goods, in pursuance of the said Act, in their respective Counties and Places, which Certificate, or an attested Copy thereof, signed by the Officer to whom the same should be so transmitted, should be taken and deemed sufficient Evidence of the Rates

and Price set for the carrying of Goods to any County or Place: And Whereas, the Provisions hereinbefore recited are at present inoperative, and inapplicable to the present Times, and it is Expedient that the same should be repealed;' Be it therefore Enacted by the King's Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the passing of this Act the Provisions hereinbefore set forth, and any other Powers or Provisions in the said recited Acts contained, which relate to the Settling the Rates of the Carriage of Goods, shall be and the same are hereby severally declared to be repealed.

Repealed by Statute Law, Act of 1873.